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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

S1 16 Cr. 0338 (PKC)

5 WILLIAM T. WALTERS,

6 Defendant.

7 -----x

March 20, 2017

10:09 a.m.

9 Before:

10 HON. P. KEVIN CASTEL,

11 District Judge

12 APPEARANCES

13 JOON H. KIM

Acting United States Attorney for the  
Southern District of New York

14 BY: DANIEL S. GOLDMAN

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20 -and-

WRIGHT STANISH & WINCKLER

21 BY: RICHARD WRIGHT

22 - also present -

23 SA Edmund Rom

SA Nicholas Anderson, Federal Bureau of Investigation

24 Raymond McLeod, Defense Tech Support

Holly Meister

25 Sarah Pyun, Government Paralegal Specialists

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(Trial resumed; jury not present)

THE COURT: Please be seated.

I understand there is an issue that counsel wanted to see me on.

MR. GOLDMAN: Your Honor, there are a couple of outstanding matters. The most pressing one relates to the analyst report issue that we ended Thursday with. And I think it would be helpful to address this and reach some clarity on it before the cross-examination continues, because our review of the documents indicates Mr. Berke is going to try to show a number of analyst reports to the witness, Mr. Engles.

And what we would just want to point out, and it is to kind of separate the foundational issues from the hearsay issues. Mr. Berke can correct me if I am wrong, but we have not seen anything in the analyst reports that would amount to what your Honor described as a public fact as, as an example used last Thursday, earnings will be X. And so given that there is nothing in the analyst reports that would just simply be a public fact that would come in to defeat our allegation of the nonpublic nature of the information, we are then left merely with the state of mind of the defendant as the only nonhearsay purpose for which these analyst reports should be admitted.

And so we don't believe any of them can come in through Mr. Engles, because they go to the defendant's state of

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1 mind. And the defendant -- they must make a showing, that they  
2 can do in several ways, including through emails or through the  
3 defendant testifying, that the defendant himself saw the  
4 analyst reports, because otherwise it does not go to his state  
5 of mind. And so we are going to have a number of objections to  
6 these analyst reports coming in because there is no showing  
7 that the defendant saw them, and, therefore, it cannot be shown  
8 that it goes to his state of mind at this point.

9 MR. BERKE: Your Honor, if I may?

10 THE COURT: Yes.

11 MR. BERKE: For this witness we are not introducing  
12 any reports to show Mr. Walters' state of mind. Really, I am  
13 introducing them for one of three reasons, all of which I would  
14 submit a proffer. One, as Mr. Goldman agrees, is it reflects a  
15 public statement. Two, on a few occasions, I think we have two  
16 instances, that we are going to talk about today, Mr. Engles  
17 gives a report of events, statements he has made to the board,  
18 and attaches one or two analyst reports as part of that  
19 discussion for them to discuss at the board meeting. And I  
20 will refer to those. And he has a cover memo and email saying  
21 that he's doing that so it is clear.

22 THE COURT: Yes. But why would that be admissible?

23 MR. BERKE: It is admissible, your Honor, because it  
24 goes to inform -- it is not for the truth of the matter. It  
25 goes to inform his discussion with the board that he's making

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1 certain statements, in this case about WhiteWave. The analysts  
2 are reporting on his statements and what they understand to be  
3 important, and then he is presenting them to the board for  
4 discussions about WhiteWave and the impact it could have on the  
5 company.

6 THE COURT: I'm still not understanding why that is  
7 relevant.

8 MR. BERKE: Well, the big issue for WhiteWave and  
9 Mr. Engles is that they believe that the market analyst  
10 investors did not adequately recognize the value of WhiteWave,  
11 and part of the discussion that went on over a period of years  
12 is how they could better get value out of WhiteWave. And one  
13 of their at least two instances where they are having  
14 discussions with the board about this is what analysts are  
15 saying why they're concerned about WhiteWave, let's talk about  
16 it and figure out what we can do.

17 THE COURT: What do you mean by "concerned about  
18 WhiteWave?"

19 MR. BERKE: That they don't -- they are not valuing  
20 WhiteWave as part of Dean Foods to the extent that Mr. Engles  
21 at least felt they should and that the board should consider in  
22 contemplating various actions. So it's given for context to  
23 help explain his position about why they should consider some  
24 action, because the investors -- I'm sorry, the analysts are  
25 concerned that in its present formation it is not worth as much

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1 as it would be. And it is actually the discussion part. I'm  
2 only doing it, your Honor --

3 THE COURT: How is that cross-examination? That was  
4 his direct testimony. And what are you trying to do?  
5 Reinforce his direct testimony?

6 MR. BERKE: The cross-examination actually goes to a  
7 specific timeline that is different than the direct but that is  
8 important for our defense in the case, the timeline of when  
9 certain events happened and didn't happen which correlates to  
10 part of our defense. So as a board we go through the various  
11 board minutes to establish the timeline on WhiteWave that is --

12 THE COURT: No. Mr. Berke, let's not kid ourselves.  
13 It's not about going through board minute. That's not why  
14 we're having this discussion right now -- at all. We're having  
15 the discussion because you want to use the analyst reports that  
16 you point out were transmitted by Mr. Engles to board members.  
17 That's the focus here.

18 So if you want to do this without the analyst reports,  
19 I don't think there is an objection, even. So let's not beat  
20 around the bush.

21 MR. BERKE: All right. But in those two instances,  
22 your Honor, I do think where -- and I'll tell you what they  
23 are. There is a situation where Mr. Engles is giving his  
24 periodic report to the board and says I want to give you a  
25 summary from our investor relations person and I want to attach

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1 one or two reports about recent events that we just had and  
2 what these two analysts are saying, including Mr. Katzman, who  
3 we talked about. I have two instances where I am doing it,  
4 your Honor.

5 THE COURT: So what do the analysts say? Let's get to  
6 the heart of what we are talking about here. What do the  
7 analysts say?

8 MR. BERKE: The analysts say, in both instances, your  
9 Honor --

10 THE COURT: This is not about a chronology before the  
11 board. This is about what the analysts said. So let's hear  
12 what it is.

13 MR. BERKE: In these instances, the analysts say  
14 that -- excuse me, your Honor. They say -- in one instance  
15 they say that Mr. Engles' statement at a big conference created  
16 a crack in the door regarding a possible WhiteWave spin-off.  
17 It is a departure from prior statements. Our model, however,  
18 suggests less than robust value creation from the spin.

19 And that's from a -- that was sent to the board, and  
20 that is from a JPMorgan report. And then we also have a --

21 THE COURT: What is that relevant to, that statement?

22 MR. BERKE: Well, that statement in particular, two  
23 things: One, it shows that Mr. Engles is explaining to the  
24 board how his statements at the conference -- because if you  
25 remember, he said that he often implies things without stating

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1 it directly, so he wants the board to know that the analysts  
2 heard the message; but also that the analysts think at this  
3 time it is not necessarily a value creator because of debt  
4 problems and other problems. There is a discussion about these  
5 analyst reports.

6 THE COURT: Here's what I think. You can examine  
7 Mr. Engles all you want about what he said at the conference,  
8 that's fair game, but how what he said was interpreted is a  
9 different matter. You can even ask him, When you said, you  
10 know, the sun rises in the east, weren't you trying to imply  
11 that you were open to considering the spin-off of WhiteWave?  
12 That's a fair question. I don't mind that. But the analyst  
13 statement that he perceived that as an opening is an  
14 out-of-court statement by the analyst that is being proffered  
15 for the truth of the content that it was an opening to a  
16 WhiteWave spin-off.

17 MR. BERKE: If I may, your Honor?

18 THE COURT: Yes.

19 MR. BERKE: What I would say is I'm not offering it  
20 for the truth. What I'm offering it for is that Engles is  
21 saying to the board, just so you know, look at these analyst  
22 reports. The investors, based on my comments, are going to get  
23 the message that I wanted to convey. That's what it is.  
24 Whether it would be a news report or an analyst report, they  
25 got the message that I wanted them to. If I can't establish a

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1 foundation I can't do.

2 THE COURT: No, but you can -- you can't use the  
3 analyst report.

4 MR. BERKE: OK.

5 THE COURT: OK? You can ask Engles, did you intend to  
6 communicate to the analyst community an openness on your part  
7 to considering a spin-off of WhiteWave? And did you tell them  
8 that you were considering a spin-off? No, I didn't. Did you  
9 communicate to them any other way an openness to it? Yes, I  
10 did; no, I didn't, so on and so forth.

11 MR. BERKE: And without using the analyst reports, can  
12 I also ask him, your Honor, you understood, sir, that just as  
13 you had said last week that you often wanted analysts to pick  
14 up subtle messages, it was your understanding that based on  
15 your comments they heard you without introducing the report? I  
16 might refresh his memory, if necessary, but I won't introduce  
17 the report.

18 THE COURT: Mr. Goldman.

19 MR. GOLDMAN: We would object to that, your Honor.  
20 That's exactly the same thing on how the analysts interpreted  
21 it. He can get into what Mr. Engles intended to say, but how  
22 the analyst interpreted it is --

23 THE COURT: I agree. I want to make it abundantly  
24 clear. So far I have not said in any way, shape or form that  
25 the defense cannot call analysts on their case as to what they



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1 heard, what they believed, what they perceived, what they  
2 understood. That's a different question and I haven't been  
3 called upon to address that.

4 But, no, you can explore what Mr. Engles intended to  
5 convey, and that's the water's edge there.

6 MR. BERKE: Can I ask you one question, your Honor,  
7 while we are talking? I do have an instance where I am using a  
8 news article, again, that Mr. Engles is using with the board.  
9 I assume that's different, the news article?

10 THE COURT: Tell me about it.

11 MR. BERKE: It is a news article that is reporting on  
12 Mr. Engles' conference and what he had said to investors and  
13 that he includes it along with a summary by investor relations  
14 as well.

15 THE COURT: Well, I think the correct way to do that  
16 is to say, Mr. Engles, what did you say at the conference da,  
17 da, da, da, da. If he leaves out a detail: Let me show you  
18 this document. Read it to yourself. Does this refresh your  
19 recollection on the subject of what you said?

20 That's the way to do it.

21 MR. BERKE: Understood, your Honor.

22 THE COURT: All right. Let's bring our jury in.

23 (Continued on next page)  
24  
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Engles - cross

1 (Jury present)

2 THE COURT: Please be seated.

3 Good morning, ladies and gentlemen.

4 JURORS: Good morning.

5 THE COURT: It's very good to see you. And I'm  
6 pleased to report that, with your good wishes, some chicken  
7 soup, some tea with lemon and honey, and a doctor's  
8 prescription and a little bit of sleep, I am back in action  
9 today feeling much better. So we're ready to proceed, and I  
10 very much appreciate your cooperation throughout the trial.

11 Mr. Engles, the Court reminds you, you are still under  
12 oath.

13 THE WITNESS: I understand.

14 THE COURT: OK. You may inquire.

15 MR. BERKE: Thank you, your Honor.

16 GREGG ENGLES,

17 Resumed, and testified further as follows:

18 CROSS-EXAMINATION (Resumed)

19 BY MR. BERKE:

20 Q. Good morning, Mr. Engles.

21 A. Good morning.

22 Q. You recall -- you may not recall -- when we were talking on  
23 Thursday we were discussing WhiteWave?

24 A. Yes.

25 Q. And I want to move a little forward in our -- the timeline

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Engles - cross

1 as to where we were on Thursday and ask you just about events  
2 in December of 2009.

3 And you testified on direct that in 2009 the board at  
4 that time considered the wisdom of a spin-off of WhiteWave,  
5 correct?

6 A. Yes.

7 Q. You met with your investment banker to think about it,  
8 correct?

9 A. Yes.

10 Q. And you decided not to go forward, correct?

11 A. Yes.

12 Q. And I believe that there was a report -- and I think you  
13 may have said this -- that the advice was that the company  
14 would be replacing low cost debt with high cost debt if they  
15 did that, is that correct?

16 A. That is correct, yes.

17 Q. Would you explain what that means?

18 A. Yes. Probably the best way to do so is to give you an  
19 analogy to a mortgage on your house. There are times when  
20 interest rates are low and there are times when interest rate  
21 are high. Late 2009 was a time when interest rates were high,  
22 and the debt that we had put on the company that existed at  
23 that time had been put on when interest rates were low.

24 Q. And the company had substantial debt, you testified about,  
25 at that time, correct?

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Engles - cross

1 A. Yes, it did.

2 Q. And that was an issue -- you understood that was an issue  
3 that investors were focused on, correct?

4 A. Yes.

5 Q. Now, I want to ask you, you recall that -- now I am going  
6 into the early 2010 period, the first half of 2010. And you  
7 recall at this time that there was litigation that you  
8 mentioned?

9 A. Yes.

10 Q. I want to ask you about some of the dates. There were two  
11 separate -- well, there was a series of separate antitrust  
12 litigations failed, correct?

13 A. Yes.

14 Q. One was filed by the farmers, correct?

15 A. Two, two -- well, three -- there were five actions, I  
16 believe, and I think three or four were farmer actions.

17 Q. Do you recall all the farmer actions were consolidated in  
18 Tennessee into one big action?

19 A. Yes. There was a class action in Tennessee. There was  
20 also a class action in Vermont.

21 Q. OK. And do you recall, sir, that -- and then there was a  
22 retailer litigation raising antitrust issues as well, correct?

23 A. Yes.

24 Q. And you recall, sir, that those cases were filed in 2007?

25 A. That is -- I believe that's correct.

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Engles - cross

1 Q. And do you recall, sir, that at some point there were  
2 motions to dismiss these cases?

3 A. Yes.

4 Q. And you recall, sir, that those were denied in 2008?

5 A. I recall they were denied. I don't remember the date.

6 Q. Could I show you, just for identification, GX802?

7 A. Sure.

8 Q. This is just for you, sir.

9 (Pause)

10 And could we look at page 96? Paragraphs 1 and 2. If  
11 we could make the heading bigger just for the witness.

12 And, sir, I would ask you to look -- do you see the  
13 first paragraph, sir?

14 A. That begins, "We were named."

15 Q. Yes. Just to yourself, sir.

16 A. Yes.

17 Q. I just want you to see what it is just so you see what it  
18 is.

19 And then I want you to go to the second paragraph.  
20 Again, in the middle of the paragraph beginning, "A motion to  
21 dismiss." No. The sentence above that, Mr. McLeod.

22 Again, just to yourself, sir.

23 A. Yes.

24 Q. And my question for you, sir, is do you recall motions to  
25 dismiss were denied in 2008? Does that refresh your memory?

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Engles - cross

1 A. Yes, it does.

2 Q. OK. Thank you, sir.

3 And, sir, I think you testified that in your direct  
4 litigation would have made it impossible to do the spin-off,  
5 correct?

6 A. Yes.

7 Q. And am I right, sir, that the damages were something  
8 like -- they were seeking something like three-quarters of a  
9 billion dollars, or some very large number?

10 A. They were a very large number, yes.

11 Q. Sir, I want to now go to March 2010, and I want to show you  
12 a document that's been admitted into evidence as Defense  
13 Exhibit 1912B.

14 MR. BERKE: And if I may show it, your Honor,  
15 published? It is in evidence.

16 THE COURT: All right.

17 (Pause)

18 Q. If we could just highlight the top just as a reminder of  
19 what it is.

20 So you see, sir, just to orient you as to what it is,  
21 you see this is an email from Steve Kemps, your general  
22 counsel, to others, including yourself, and it refers to a  
23 meeting with several investors in Boston? Do you see that,  
24 sir?

25 A. Yes.

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Engles - cross

1 Q. OK. And in the second half, if you go down a little lower,  
2 you will see there is -- if we could just go to the end of this  
3 just so you can see what that is first. You will see it is a  
4 summary by Barry Sievert, the head of the investor relations.

5 MR. BERKE: Mr. McLeod, if you could go to the bottom  
6 of the document just to show the witness what it is. All the  
7 way to the bottom, the second page.

8 Q. And you see there is a summary by Mr. Sievert, sir?

9 A. Yes.

10 Q. Now if we could go back up to the first page of the  
11 summary.

12 And you see, if you go to the first paragraph, this is  
13 summarizing the meeting. If you look at the second sentence,  
14 this was a visit with investors in Boston on Tuesday, and it  
15 was attended by some of your largest investors -- Fidelity,  
16 MFS, Wellington -- who represent well over 25 million shares;  
17 is that correct, sir?

18 A. Yes.

19 Q. Now, if you go to the substance of the meeting on the  
20 second page, and if we could highlight the portion that says  
21 "WhiteWave."

22 And, sir, do you see where it says -- again, March 9,  
23 the summary of the meeting on March 9, 2010: "While less of a  
24 focus of our meetings, investors continue to show interest in  
25 the WhiteWave business, which today is a strong example of the

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Engles - cross

1 benefits of investment and transformation." It goes on to  
2 describe how the platform grew operating profits. And then it  
3 says, "We were asked about the possibility of spinning the  
4 business out. We reiterated our belief that the platform will  
5 continue to post strong double-digit growth, and is a valuable  
6 asset for the company."

7 Sir, that reflects that a large sum of your largest  
8 investors, most sophisticated investors were asking in  
9 March 2010 about possibly spinning off WhiteWave, correct?

10 A. Yes.

11 Q. And that reflects generally how the company would respond  
12 to those questions at that time, correct?

13 A. Correct.

14 Q. Now, sir, if I -- now, could I ask you a question, sir?  
15 Could I show you what is marked 1044, in evidence? I'm sorry,  
16 not in evidence, for identification. Excuse me, your Honor.  
17 Defense Exhibit 1044.

18 And do you recognize this as an email sent from  
19 Ms. Sellers to you and the board on your behalf on April 1,  
20 2010?

21 A. Yes, I do.

22 MR. BERKE: Your Honor, I would offer into evidence  
23 Defense Exhibit 44.

24 MR. GOLDMAN: No objection.

25 THE COURT: Received.



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Engles - cross

(Defendant's Exhibit 44 received in evidence)

BY MR. BERKE:

Q. And, sir, you say, "Attached is my first mid-cycle update memo." And then if you see in the attachment line, you see that you attach, it says, a "board update article"? Do you see that, sir?

A. Yes.

Q. Now, do you recall that during this time period, or maybe all the time periods, you will tell us, that you would send articles as part of your mid-cycle updates to the board?

A. No, I don't. I don't recall that.

Q. Is that something you would do?

A. I sent things just to the board from time to time. I don't recall exactly how many mid-cycle updates I did but it was -- this is the only one I've ever seen, actually. I don't know if there was a practice that I continued.

Q. OK. Well, let me show you what's been marked for identification as Defense Exhibit 1046. And I'll ask you, sir, again, without identifying it, do you recall sending this article to the board?

A. I don't recall it.

Q. OK.

A. But I see it.

Q. Understood. And as you sit here today, I mean, in terms of your practice in dealings with the board, if you would send the

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Engles - cross

1 materials, generally what would be the purpose you would send  
2 them for?

3 A. Just to keep them updated on what was happening between  
4 meetings, if there were items of interest or importance that I  
5 felt needed to be communicated to them.

6 Q. Would it be to share with them points of view that you felt  
7 were important for them to be aware of?

8 A. Yes. From time to time, absolutely.

9 Q. And, sir, do you recall during when sending the March 2010  
10 mid-cycle review, you wanted to -- you were interested in them  
11 knowing what the market, the reporters and the like, were  
12 saying about a possibility of a WhiteWave spin-off?

13 A. I don't recall specifically what I intended with that memo;  
14 it was seven years ago. But I certainly intended to make them  
15 aware of things that I attached to it.

16 Q. OK. And, now, do you recall, sir -- if I could show you  
17 what's in evidence as Government Exhibit 513?

18 Do you recall, sir, that this is a transcript of the  
19 Back-To-School conference that you were asked about?

20 A. Yes.

21 Q. And you recall, sir, that you were shown, if you  
22 remember -- and I can show it to you if you need it -- that you  
23 were asked a question and answer about WhiteWave? Let me just  
24 show you, if I may, it is at page 8 of the transcript, the last  
25 two paragraphs.

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Engles - cross

1 A. Yes.

2 Q. OK. And do you recall -- we talked a little bit about that  
3 on direct -- that this is in response to the questions? And,  
4 again, the date of this is September 2010, if you recall?

5 A. Yes.

6 Q. And in talking about WhiteWave, you again are talking about  
7 you are aware of the value it has in your business. And if you  
8 go down to the last sentence, you think it is incumbent upon  
9 management to try and find a way to unlock that value for your  
10 shareholders over time, correct?

11 A. Yes.

12 Q. And am I right, sir, that what you were trying to convey to  
13 investors by making that statement was that you thought  
14 WhiteWave would was not adequately reflected in your share  
15 price and that the appropriate time, when the preconditions  
16 were right, you were going to go forward with the spin-off?

17 A. We were certainly trying to convey that we did not believe  
18 that the value of WhiteWave was reflected in our stock and that  
19 we were going to do those things necessary -- whatever they  
20 might be -- in order that it be reflected in our stock. I  
21 don't believe at this point in time we had described what we  
22 thought were preconditions necessary to spinning the business  
23 off, and so I don't think at this point in time I would have  
24 been alluding to the satisfaction of those because we hadn't  
25 articulated those.

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Engles - cross

1 Q. Do you recall being interviewed by the prosecutors in this  
2 case early last year?

3 A. Yes.

4 Q. And, sir, do you recall telling them at that time that --  
5 when looking at that transcript, that we thought the value of  
6 WhiteWave was not adequately reflected in --

7 MR. GOLDMAN: Your Honor, if he could just refresh by  
8 showing -- it is not in evidence.

9 THE COURT: Yes. If you are reading from a document  
10 that is not in evidence, it is not appropriate.

11 Q. All right. Sir, let me ask you, sir, do you recall  
12 addressing this transcript in meetings with the prosecutors in  
13 this case?

14 A. In general, yes.

15 Q. OK. And do you recall specifically what you told them  
16 about this?

17 A. Not exactly, no.

18 Q. OK. Let me show you what's been marked for identification  
19 as 3509-2. And this is just for you, sir. So first I am just  
20 going to show you what's at the beginning just so you can see  
21 what it is.

22 A. OK.

23 Q. And if I could direct your attention to page 3, last  
24 paragraph.

25 And, sir, if you would just read that to yourself.

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Engles - cross

1 (Pause)

2 A. Yes. I see that.

3 Q. OK. And my question to you, sir, is do you recall that in  
4 meetings in early 2016, you had said that one of your purposes  
5 in making that statement was to convey that at the appropriate  
6 time, when the preconditions were met, the company would go  
7 forward with the spin-off?

8 A. I do not recall saying that specifically. These notes --

9 THE COURT: No. No. That was the question.

10 THE WITNESS: OK.

11 THE COURT: That was the question.

12 A. I do not recall saying that specifically.

13 Q. But would it be fair to say, sir, that you intended to  
14 convey at the conference positive feelings about actions you  
15 might take with regard to WhiteWave?

16 A. Yes. Yeah, I think the transcript that you showed me  
17 reflects that, that we understood the value of WhiteWave and  
18 that we intended to make that value tangible for our  
19 shareholders.

20 Q. And the notion of unlocking value, that's a phrase you use  
21 repeatedly over time, correct?

22 A. Absolutely, yes.

23 Q. Would it be fair to say, sir, that you understood that over  
24 time savvy investors understood unlocking value to refer  
25 specifically to a spin-off?

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Engles - cross

1 MR. GOLDMAN: Objection, your Honor, asking what  
2 investors think.

3 MR. BERKE: The witness' understanding, your Honor.

4 (Pause)

5 THE COURT: There is no question pending.

6 THE WITNESS: I'm waiting.

7 MR. BERKE: Oh, your Honor. I didn't hear your Honor.

8 THE COURT: I said, rephrase the question.

9 MR. BERKE: I'm sorry. I didn't hear your Honor.

10 Thank you.

11 Q. And, sir, do you have an understanding of how, over time,  
12 investors understood your statement that you were looking for  
13 ways to unlock the value of WhiteWave?

14 MR. GOLDMAN: Objection, your Honor.

15 THE COURT: Rephrase it, please.

16 Q. The phrase that you used, unlocking the value for  
17 WhiteWave, you used that phrase repeatedly over time, correct?

18 A. Yes, I did.

19 Q. OK. Why did you use the phrase, unlocking the value of  
20 WhiteWave?

21 A. Because the value of WhiteWave was, to use that language,  
22 locked inside of the larger Dean Foods, and we needed to find a  
23 way to get it out.

24 Q. And do you recall on Thursday you talked about that  
25 sometimes you had made statements that you had hoped savvy

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Engles - cross

1 investors or analysts would understand more than what you are  
2 saying? Do you recall that, sir?

3 A. Well, we -- I recall saying that we made statements that  
4 weren't necessarily taken literally but that were intended to  
5 convey what we were considering doing as a company. We felt  
6 that was important for investors.

7 Q. And that was your intent in using the phrase "unlocking the  
8 value of WhiteWave," correct?

9 A. Well, it was quite literal in that sense that our intent  
10 was that the value of WhiteWave be made available for our  
11 shareholders who owned company one way or the other.

12 Q. And generally I think you testified one way was a spin off  
13 of WhiteWave, correct?

14 A. Absolutely, yes.

15 Q. The other was a sale of WhiteWave, correct?

16 A. Possibly, yes.

17 Q. And you were opposed to a sale of WhiteWave, correct?

18 A. I was opposed to a sale of WhiteWave.

19 Q. If I may show you what's marked for identification as  
20 Defense Exhibit 1050?

21 And is this an email from your assistant Angelle  
22 Sellers to you and others at the company?

23 A. Yes, to the Board of Directors.

24 Q. And the board.

25 It is dated September 20, 2010?

H3kdwall

Engles - cross

1 A. Correct.

2 MR. BERKE: Your Honor, I would offer Defense Exhibit  
3 1050 into evidence.

4 MR. GOLDMAN: No objection.

5 THE COURT: Received.

6 (Defendant's Exhibit 1050 received in evidence)

7 MR. BERKE: If we may publish it.

8 Q. Now, if I can direct your attention to the sentence that  
9 begins, "Given the recent rumors."

10 A. Can you highlight that for me, please?

11 Q. Yes. One second. You have to go down further. And a  
12 little further.

13 MR. GOLDMAN: Which exhibit is this again?

14 MR. BERKE: 1050.

15 Q. And so, sir, you see in the summary it says, "Given the  
16 recent rumors, as well as the trajectory of the business over  
17 the past few quarters, investors are probing as to what assets  
18 might be for sale to help shore up the balance sheet and fund  
19 the increase in capital expenditures that the network  
20 optimization projects will require?"

21 Sir, do you remember what rumors you are talking  
22 about?

23 A. I do not.

24 Q. I should have been clear. This summary, if we go to the  
25 first page, this is talking about the September 2010



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Engles - cross

1 Back-To-School combined conference we talked about, correct?

2 A. Yes.

3 Q. Can I ask you, sir, you see that you attach two analyst  
4 reports to this? If you see, J.P. Morgan 9-7-10, Stifel  
5 Nicolaus 9-7-10?

6 A. Yes.

7 Q. Can I ask you why you did that, sir?

8 A. I believe they had information that was relevant to the  
9 board.

10 Q. Was it important to you, sir, as the CEO how analysts were  
11 interpreting or understanding the remarks that you made at  
12 conferences like these?

13 A. Sure.

14 Q. And was it important how they were interpreting and  
15 understanding comments you made at events like about WhiteWave?

16 A. Yes.

17 Q. Why?

18 A. We wanted accurate information to be out there in the  
19 marketplace.

20 Q. And so you wanted to see how they were interpreting what  
21 you said to make sure it was accurate, correct?

22 A. Yes.

23 Q. And if it wasn't accurate, what would you do?

24 A. If it was materially inaccurate, certainly from time to  
25 time we would correct it.

H3kdwall

Engles - cross

1 Q. Do you recall whether in this instance you believed that  
2 the analysts you attached were accurate in what they were  
3 reporting on?

4 A. I don't recall these reports at all.

5 MR. BERKE: Your Honor, may I show to the witness the  
6 reports?

7 THE COURT: Yes, if the question is do you recall the  
8 reports.

9 BY MR. BERKE:

10 Q. Can I show you what's been marked Defense Exhibit 1053,  
11 just for identification?

12 A. Sure.

13 Q. And you see what that is, correct?

14 A. Yes.

15 Q. OK. If you will scroll down. Still the first, and if you  
16 can just make the whole page big.

17 If you look at the third bullet point and just to  
18 yourself, sir.

19 (Pause)

20 A. Yes.

21 Q. OK. And could I also show you the first paragraph, as  
22 well?

23 (Pause)

24 A. Yes.

25 Q. OK. And, sir, does that refresh your memory as to why you

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Engles - cross

1 were attaching -- and you see what the report is -- why you  
2 were attaching a JPMorgan report, as indicated in your email to  
3 the board? Was it because you felt the report was accurate or  
4 inaccurate in your --

5 THE COURT: Well. Pause. Pause. Pause.

6 The witness testified that he did not recall these  
7 reports. I thought you were showing the witness these reports  
8 to take a look at to see whether they refreshed his  
9 recollection as to the reports.

10 MR. BERKE: Fair enough, your Honor. Thank you.

11 Q. Sir, does this refresh your recollection as to, in this  
12 case, the JPMorgan report?

13 A. It refreshes my recollection that it was put out, yes, but  
14 not as to the details that are in it or why I would have  
15 attached it to the email.

16 THE COURT: Next question.

17 MR. BERKE: OK. Thank you, your Honor.

18 BY MR. BERKE:

19 Q. Sir, let me show you what's been marked for identification  
20 as GX603-C.

21 A. Yes.

22 Q. And you see, sir, that this is a Dean Foods earning call  
23 transcript for third quarter 2010?

24 A. Yes.

25 MR. BERKE: Your Honor, I would offer Government

H3kdwall

Engles - cross

1 Exhibit 603C into evidence.

2 MR. GOLDMAN: No objection.

3 THE COURT: Received.

4 (Government's Exhibit 603-C received in evidence)

5 BY MR. BERKE:

6 Q. And you said, Mr. Engles, these are all public? These are  
7 publicly available, correct?

8 A. Yes.

9 Q. And I'd like to show you, if I could direct your attention  
10 to page 10.

11 I'd like to show you a question by Eric Sirota. And  
12 he's an analyst -- do you recall, he is an analyst at I believe  
13 it is Wells Fargo?

14 A. I don't recall where he is from but definitely an analyst  
15 that covered the company.

16 Q. OK. Do you see where he asked, "I'm wondering whether you  
17 could comment on potential asset sales or spinoffs," correct?

18 A. Yes.

19 Q. And if you could go to your answer during this third  
20 quarter 2010 earnings call, which is right below, and I'd like  
21 to identify what you say first and third. So if you could read  
22 the words beginning with "First."

23 A. "First of all, let me just clear up the point of greatest  
24 confusion in your question. We are not further integrating  
25 WhiteWave with FDD-Morningstar. My commentary around

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Engles - cross

1 organizational structure is that we are further integrating FDD  
2 and Morningstar, which reside within the same segment."

3 Q. Could you go one more sentence, please?

4 A. "So apparently that wasn't clear enough in our prepared  
5 comments, but we have quite separate businesses between  
6 WhiteWave and Alpro."

7 Q. Again, I'm sorry, the next two sentences as well.

8 A. "And it's important that we maintain separate businesses  
9 for lots of reasons. First of all, they're quite different,  
10 and, secondly to your point, perfectly appropriately, it allows  
11 us to maintain strategic flexibility to make decisions in the  
12 future that will maximize value for our shareholders."

13 Q. Sir, let me stop you there.

14 What did you intend to convey when you said maintain  
15 WhiteWave separate from the other business allows you to  
16 maintain strategic flexibility to make decisions in the future?

17 A. It means that we could separate them in the future either  
18 by a sale or a spin-off.

19 Q. Now, sir, if you would go to the bottom where it says,  
20 "Third."

21 A. "The third thing I would point out is that these sources of  
22 corporate structural activities that you allude to often come  
23 with a host of other costs and complexities that aren't readily  
24 apparent on the surface. So for the time being,  
25 WhiteWave-Alpro is an important value-creating asset within the

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Engles - cross

1 portfolio of Dean Foods. It is managed quite separately and is  
2 separable, and we're keenly aware of all the valuation issues  
3 that you're discussing.

4 Q. Is it fair to say, sir, when you say, in the beginning of  
5 the last sentence, "so for the time being," and then go on to  
6 say in the next sentence it is quite separable -- "and is  
7 separable," you are intending to convey again that WhiteWave  
8 could be separate from the company that is having a spin-off  
9 for sale, correct?

10 A. Absolutely.

11 Q. Now, I'd like to turn to a topic -- so, leaving third  
12 quarter 2010, and you recall in the end of 2010 going through  
13 2011 and into 2012, the debt ratio of the company was a  
14 significant issue that the company addressed; do you recall  
15 that, sir?

16 A. Yes, I do.

17 Q. Could you explain for the jury what "debt ratio" refers to  
18 in the context of Dean Foods?

19 A. It refers to the amount of income that you generate in  
20 comparison to how much debt that you have. So, for example,  
21 the more income you have, the more money you earn, the easier  
22 it is to manage any given amount of debt and the debt ratio is  
23 lower. When the income goes down or the debt goes up, the debt  
24 ratio gets higher and more difficult to manage.

25 Q. And is it fair to say, sir, that during the time period

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Engles - cross

1 when you say second half of 2010 into 2011, the company was  
2 trying very hard to lower the debt ratio, correct?

3 A. Yes, it was.

4 Q. That was a problem for Dean Foods, correct?

5 A. Yes, it was.

6 Q. And you talked about how the stock value of Dean Foods  
7 during this period was low, and you understood -- and it was  
8 your belief, was it not, that one of the reasons was because  
9 investors had concerns about that debt ratio?

10 A. Yes.

11 Q. And I'd like to just -- if I could go to a document you  
12 were shown on direct testimony and admitted into evidence as  
13 Government Exhibit 505. And if I may publish it briefly?

14 And if we could look at page 8, the second and third  
15 paragraph, please, Mr. McLeod.

16 And, again, you've already talked a bit about this. I  
17 just want to ask you very briefly.

18 In this -- and, again, if I could just -- I don't  
19 think I showed the date. If we could just show the date of  
20 this as well.

21 A. Yes. Can you tell me what this document is?

22 Q. I'm sorry. Let me go to the first page and then I'll come  
23 back to page 8. If we could highlight it? Thank you.

24 This is the CAGNY conference that you talked about --

25 A. OK.

H3kdwall

Engles - cross

1 Q. -- on Thursday?

2 THE COURT: Government Exhibit 505.

3 MR. BERKE: Yes. Thank you, Judge.

4 Q. And if we could just get a date on it.

5 Do you recall it is February 22, 2011, and we will  
6 show you?

7 A. Yes.

8 Q. OK. Thank you, sir.

9 Now if you go to page 8? Thank you, Mr. McLeod. I  
10 want to show you the second and third paragraph.

11 You see here you are talking about the WhiteWave  
12 business again, correct?

13 A. Correct.

14 Q. And you -- if you look at the first paragraph that is shown  
15 here, you are talking about supporting the continued growth in  
16 earnings and we expect while reducing the leverage on our  
17 balance sheet, correct?

18 when you talk about reducing the leverage on the  
19 balance sheet, is that referring to debt ratio?

20 A. Yes, it is.

21 Q. OK. And then you say about it, "This approach preserves  
22 our future ability to separate the businesses tax-free."

23 A. Correct.

24 Q. OK. And then if you go to the next paragraph, and if you  
25 go just to the sentence beginning with "However," do you see



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Engles - cross

1 where you said, "I felt it was important to give you a  
2 perspective of the pros and cons of any short-term separation  
3 event, with the understanding that we continue to evaluate this  
4 on a regular basis?"

5 A. Yes.

6 Q. Correct, sir? OK.

7 Now, do you recall, sir, again at this conference you  
8 were asked specifically about how the debt ratio of the company  
9 impacted the potential spin-off of WhiteWave?

10 A. Yes.

11 Q. OK. And, sir, if we could go to our -- excuse me, Mr.  
12 McLeod, if we could now go to page 9. And you see there is a  
13 question being asked by an unidentified questioner, and it  
14 says: "Just in terms of where you covered the strategic  
15 options, and with the prospect or the theory of being able to  
16 do a tax-free split, what level of debt would make that a  
17 possibility? Is it under three times debt-to-EBITDA ratio?"

18 Sir, first, you understood the person asking how low  
19 did you think the debt ratio had to go before you could  
20 potentially do a spin-off of WhiteWave, correct?

21 A. Yes.

22 Q. And if I now can direct you to your answer. And if you  
23 could just read your answer here, sir, in the first paragraph.

24 A. "No, I don't think it's that low. I think, without being  
25 in debt markets where you know what the terms are at the time

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Engles - cross

1 available, it's hard to find a -- to give you a specific number  
2 of leverage or leverage multiple that the business needs to get  
3 to. But the things that you need to consider are that the milk  
4 business today -- that the milk business has clearly been, over  
5 the last several quarters, a much more volatile business than  
6 it has historically."

7 Q. OK. Sir, that is good there, but I am going to ask you now  
8 to go to the second paragraph, if I may. And you see the  
9 paragraph saying, "So the determining factor," the second --

10 A. Yes.

11 Q. If you would read that now, sir.

12 A. "So the determining factor will be how much leverage we can  
13 put on the milk business at the time of a spin in order to  
14 affect the spin, and it's, I think, significantly below the  
15 level that exists today. So I would say certainly below four  
16 times to make the milk business a comfortable business in terms  
17 of pursuing a strategy and leveraging price."

18 Q. So is it fair to say, sir, that you are conveying in  
19 February 2011, that you thought, based on your current thinking  
20 then, getting the Dean Foods' debt ratio below 4 would be a  
21 good situation to potentially do a spin-off of WhiteWave?

22 A. Yes.

23 Q. OK. And did you expect, sir, that savvy, sophisticated  
24 investors were going to pay particular attention to your debt  
25 ratio going forward?

H3kdwall

Engles - cross

1 MR. GOLDMAN: Objection, your Honor.

2 THE COURT: I will allow it.

3 A. Yes.

4 Q. And do you recall, sir, going forward, that Dean Foods and  
5 you were in fact were successful in bringing down the debt  
6 ratio?

7 A. Yes.

8 Q. And can I show you what's been marked for identification as  
9 Government Exhibit 604-B?

10 (Pause)

11 And you see, sir, this is now the second quarter 2011  
12 earnings call. We went from February 2011. You see now we are  
13 in August 4, 2011, correct?

14 A. Yes.

15 MR. BERKE: Your Honor, I would offer Government  
16 Exhibit 604B into evidence.

17 MR. GOLDMAN: No objection.

18 THE COURT: Received.

19 (Government's Exhibit 604B received in evidence)

20 MR. BERKE: If we can publish it. First publish the  
21 first page to show what it is.

22 Thank you, your Honor.

23 (Pause)

24 Q. Again, sir, as you said, it's the second quarter 2011  
25 earnings call transcript on August 4, 2011, and, again, a

H3kdwall

Engles - cross

1 publicly available document, correct?

2 A. Correct.

3 Q. OK. I'd like you to go to -- again, as you know there are  
4 questions, I would like you to go to the questions at page 13,  
5 if I may. There is a question from Judy Hong of Goldman Sachs.

6 If we could highlight that and the answer.

7 (Continued on next page)

H3K3WAL2

Engles - cross

1 Q. Do you see Judy Hong, an analyst from Goldman Sachs,  
2 correct?

3 A. Correct.

4 Q. You see where she says "Okay, and just finally on the  
5 WhiteWave-Alpro, given your leverage has come down a bit, any  
6 update to thinking in terms of potentially unlocking the value  
7 of that business? I know you guys went through the review in  
8 October of last year, but just in terms of how you're thinking  
9 about the option at this point."

10 A. Yes.

11 Q. If you would begin to read your answer.

12 A. "Yes, look. I think what we said early this year and late  
13 last year, we understand the value unlocking potential of  
14 disaggregating our portfolio. We understand that really  
15 clearly and we understand the benefit of our shareholders of  
16 doing that. We've got to get to a position where we can do it  
17 in a way that in fact unlocks value. And we still have some  
18 hurdles to overcome in terms of getting there. So really no  
19 update with respect to that other than to reiterate that we are  
20 mindful of the value creation opportunity for our stockholders,  
21 and we continue to try to move the business and its positioning  
22 to a logical place where that can be accomplished should, at  
23 that time, it continue to present value creation  
24 opportunities."

25 Q. You recall, sir, at subsequent earnings announcement and

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Engles - cross

1 earnings call you highlighted the debt ratio and the fact that  
2 it was falling each quarter? Do you recall that, sir?

3 A. Yes, we spoke about our leverage ratio on almost every  
4 call, I believe.

5 Q. If I can now show you what's marked as 604-D for  
6 identification. Sir, you see that's fourth quarter 2011  
7 earnings call February 15, 2012?

8 A. Yes.

9 MR. BERKE: Your Honor, I'd offer Government Exhibit  
10 604-D into evidence.

11 MR. GOLDMAN: No objection.

12 THE COURT: Received.

13 (Government's Exhibit 604-D received in evidence)

14 MR. BERKE: If we can publish beginning with the first  
15 page, Mr. McLeod.

16 Q. You see it says February 15, 2012, correct?

17 A. Yes.

18 MR. BERKE: If we can go to page seven, sixth  
19 paragraph. Sixth. And just to be clear, if we can go a little  
20 higher so you can show the witness who is speaking here.

21 Q. This is Shaun Mara speaking. And it says here he is your  
22 former chief financial officer and executive vice president.  
23 Was this a recent change of his position?

24 A. I believe that's mistaken. I believe he was our chief  
25 financial officer at the time.

H3K3WAL2

Engles - cross

1 Q. Good. Okay. And so you see he's speaking now. If you can  
2 go to the sixth paragraph. And you see where he says "If I  
3 may. With the added cash provided by divestitures we  
4 successfully reduced our debt outstanding by 324 in 2011. Our  
5 leverage ratio of funded debt to EBITDA as defined by our  
6 credit agreements continues to decline. As we stated earlier  
7 in the year, our goal was to reduce our leverage to below 4.75X  
8 by year end. We achieved this ending the year at 4.64. This  
9 is more than a full turn below our current maximum covenant."

10 Then you say "we anticipate our" -- I'm sorry. This  
11 is Mr. Mara, says "We anticipate our leverage ratio will be  
12 approximately 4.5 at the end of the first quarter." Continuing  
13 that sentence, the next sentence, "and we will continue to  
14 focus our leverage reduction in 2012. All in all, fourth  
15 quarter was very successful from an operating income, EPS, cash  
16 flow and debt reduction perspective."

17 Again, sir, all of that debt references are all the  
18 same debt ratio concept we've been talking about, correct?

19 A. Yes.

20 Q. After, sir, this February conference call it continued  
21 to -- the debt ratio of Dean Foods continued to decline in the  
22 first half of 2012, didn't it, sir?

23 A. Yes, it did.

24 Q. Let's go forward. Do you recall, sir, that in July of  
25 2011, there was an announcement that the litigation, that you

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Engles - cross

1 had reached a settlement with the plaintiffs in the litigation  
2 we talked about, the antitrust litigation, and it would be over  
3 subject to the judge approving that settlement?

4 A. As to one of the cases, yes.

5 Q. Do you recall, you recall that was the dairy farmer case,  
6 correct?

7 A. Yes. Excuse me.

8 Q. Finish.

9 A. Just to be clear, there were two large dairy farmer class  
10 actions. They were not consolidated. One in Vermont, one in  
11 Tennessee, there was a retailer antitrust litigation, and then  
12 there were one or two individual cases in Mississippi. As to  
13 one of those cases, I believe that July was the announcement.

14 Q. Do you recall it was a significant case where you were  
15 going to pay \$140 million?

16 A. Yes, that was the Tennessee litigation.

17 Q. My only question about that, sir, in July 2011, the company  
18 issued a press release indicating you're starting to settle  
19 these matters, correct?

20 A. Yes.

21 Q. Those efforts continued after July 2011, correct?

22 A. Correct, yes.

23 Q. Is it fair to say that by May 2012, a lot of events were  
24 coming together to create preconditions for the WhiteWave  
25 spinoff?



H3K3WAL2

Engles - cross

1 A. Yes.

2 Q. It's fair, I think you've said publicly, and that two  
3 conditions that definitely had to be met before there could be  
4 a WhiteWave spinoff would be the litigation had to be resolved,  
5 correct?

6 A. Yes.

7 Q. And the debt ratio had to come down significantly, correct?

8 A. Yes.

9 Q. Both those things were happening, correct?

10 A. That's correct.

11 Q. Now, sir, if I can show you what is admitted into evidence  
12 as Government Exhibit 605-A. Again, sir, if I can show you  
13 this is the first quarter 2012 earnings call dated May 9, 2012,  
14 correct?

15 A. Correct.

16 Q. What I want to ask you about is at page seven, top  
17 paragraph, but I needed to go a little before then to show you  
18 who is talking.

19 Again you see for some reason they keep getting  
20 Mr. Mara's title wrong, but you see your chief financial  
21 officer is speaking there?

22 A. Yes.

23 Q. If we go to page seven, the paragraph beginning "despite."  
24 And you see where on May 9, 2012, Mr. Mara says that "Despite  
25 the slight growth in debt with a strong growth in EBITDA our

H3K3WAL2

Engles - cross

1 leverage ratio" -- sir, I'm sorry what is EBITDA?

2 A. It is a measure of earnings. How much money you earn.

3 Q. It is a way of measuring earnings?

4 A. Yes.

5 THE COURT: Earnings before interest, tax and  
6 amortization.

7 THE WITNESS: Interest, taxes, depreciation, and  
8 amortization.

9 THE COURT: That's the D.

10 MR. BERKE: Thank you, Judge. I appreciate that.

11 Q. And you see where it says that the funded debt or the debt  
12 ratio is continuing to fall, correct?

13 A. Correct.

14 Q. And you see where if you go to the last sentence, Mr. Mara  
15 says "We expect total leverage to be at or below 4X by the end  
16 of the year"?

17 A. I do see that.

18 Q. You recall, sir, when we go back to February of 2010, in  
19 response to a question from an analyst in February on the  
20 earnings call, you indicated at that time that looking ahead  
21 you thought if the debt ratio fell below 4, that would be a  
22 good time to do the spinoff?

23 A. I do recall that, yes.

24 Q. That wasn't hard and fast, correct?

25 A. Not hard and fast, no.

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Engles - cross

1 Q. On the same document, if I can go to your question and  
2 answer at 10. I'm sorry, begins at nine actually just to see  
3 the questioner. Eric Katzman, who we discussed on Thursday you  
4 thought he was the best or one of the best analysts at Deutsche  
5 Bank that covered Dean Foods?

6 A. Very good analyst.

7 Q. You see where Mr. Katzman says "The leverage has limited  
8 your -- by your own comments -- your financial flexibility or  
9 strategic flexibility with WhiteWave to recognize an asset that  
10 by the comments today is hitting on all cylinders. Can you  
11 talk about a little bit about at what leverage point WhiteWave  
12 is a potential asset to be spun off or sold."

13 You see that, sir?

14 A. I do see that, yes.

15 Q. And now if we can pick up where it says "so what I would  
16 tell you." Well, actually we can go a little higher than that.  
17 Okay. Can we go a little bit higher than that. Thank you.

18 Can you read the sentence beginning "so if we don't  
19 feel."

20 A. Yes. "So if we don't feel that the value of WhiteWave is  
21 being reflected in the aggregate value of Dean Foods, we  
22 understand that there is an opportunity to recognize the value  
23 for our shareholders by operating it. And we, again, I think,  
24 stated that very clearly -- stated very clearly -- stated that  
25 very clearly one and a half years ago. There have been some

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Engles - cross

1 constraints on our ability to do so, which we highlighted in  
2 2011. And those constraints were around the amount of leverage  
3 that the businesses being separated could sustain, and what the  
4 appropriate leverage profile was for the businesses if you were  
5 to separate them, and litigation that frankly had to be  
6 resolved before you could separate the businesses. We've  
7 largely resolved the litigation. That's a very large net  
8 positive for this company, and our leverage level is working  
9 down. So what I would tell you is we don't have a specific  
10 leverage target at which we are going to pull the trigger, but  
11 we're mindful of the opportunity we think to perhaps accrete  
12 value for our shareholders. And it's something that our  
13 management and our board considers on a regular basis."

14 Q. Is it fair to say, sir, your intent in making that  
15 statement is to convey to the investment community that you  
16 were seriously contemplating a spinoff of WhiteWave based on  
17 all the things you just read?

18 A. Yes. I think that's fair.

19 Q. At that time, the board had not approved a spinoff,  
20 correct?

21 A. No, it had not.

22 Q. You didn't know if there was going to be a spinoff?

23 A. I did not.

24 Q. It was something you wanted to see happen if it could?

25 A. Yes.

H3K3WAL2

Engles - cross

1 Q. You recall the same day you made that statement, sir, that  
2 Dean Foods issued a press release indicating that significant  
3 settlement in the antitrust litigation had been approved?

4 A. I do not recall it was that day. I don't recall when it  
5 was.

6 Q. Can I show you what's been marked GX 819 for  
7 identification.

8 A. Sure. This is our form 10-Q.

9 Q. Can I show you the date of this.

10 MR. GOLDMAN: It's right there.

11 MR. BERKE: Yes.

12 Q. You see the date, sir?

13 A. April 27 -- well --

14 THE COURT: You need a magnifying glass.

15 MR. BERKE: Hold on.

16 A. There's a lot of dates on here.

17 Q. Yeah. So let me -- give me one second. All the way at the  
18 bottom I'm told. There.

19 A. No, that's not the date of the document.

20 Q. That's not it. Okay. I think we have to go to the end of  
21 it. The next page.

22 MR. BERKE: I'm sorry, your Honor. If we can go to  
23 the very end.

24 Q. May 9, 2012.

25 So, sir do you recall that the company filed their

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Engles - cross

1 10-Q May 9, 2012?

2 A. I do, yes.

3 Q. All right. I apologize for the delay.

4 THE COURT: Let me ask you. Do you recall they filed  
5 May 9, 2012 or do you read on the piece of paper they filed  
6 May 9, 2012?

7 THE WITNESS: I read it on the piece of paper.

8 THE COURT: Do you recall whether it was that day?

9 THE WITNESS: We almost always filed it on the day  
10 that we issued our press release and our earnings, so that's my  
11 recollection.

12 THE COURT: But do you recall --

13 THE WITNESS: I don't specifically recall filing this  
14 or any Q as of that date, but that was our practice.

15 THE COURT: I understand it was your practice. I just  
16 wanted to make the distinction between your practice and what  
17 you recall.

18 THE WITNESS: Got it. Thank you.

19 MR. BERKE: Thank you, your Honor.

20 Q. But you recognize this as your 10-Q filed roughly around  
21 that time period, correct?

22 A. Yes.

23 MR. BERKE: Your Honor, I'd offer Government Exhibit  
24 819 into evidence.

25 MR. GOLDMAN: No objection.

H3K3WAL2

Engles - cross

1 THE COURT: Received.

2 (Government's Exhibit 819 received in evidence)

3 MR. BERKE: If we can publish the first page.

4 Q. This is the company's 10-Q, correct?

5 A. Yes, it is.

6 Q. Can you just briefly tell the jury what a 10-Q is?

7 A. This is the document that we file with the Securities and  
8 Exchange Commission, it is a publicly available document. And  
9 it reports our financial results for the prior quarter, which  
10 this is for the quarterly period ending on March 31, 2012. It  
11 has in addition description of important matters that happened  
12 during the quarter.

13 Q. Thank you, sir. If we can go to the last page. Thank you.  
14 As we saw it was May 9, 2012, the same day as the transcript  
15 that we looked at with your remarks about WhiteWave, correct?

16 A. Yes.

17 MR. BERKE: Now if I can show you page 29. We can go  
18 to the section Tennessee retailer and purchaser actions. We  
19 have to go a little further. I'm sorry a little higher,  
20 actually.

21 Sir, and I'm sorry, if we can go the page before,  
22 Mr. McLeod, show what we're talking about. Thank you.

23 Q. See it's talking about the Tennessee dairy farmer action  
24 which you described as the big case, correct?

25 A. Yes.

H3K3WAL2

Engles - cross

1 Q. And the related Mississippi action.

2 Now if we go to page 29. On February 14, 2012, the  
3 Court granted preliminary approval of the settlement agreement  
4 and set May 15, 2012 as the date to consider final approval of  
5 the agreement.

6 That was significant for the company?

7 A. Very.

8 Q. You made clear here, but you also made clear to investors  
9 at the time, that the resolution of the litigation was a  
10 critical precondition, correct?

11 A. Yes.

12 Q. You understood, sir, that a lot of -- not everything, but a  
13 lot of what happened with the litigation was publicly available  
14 through transcripts and the like?

15 A. Yes.

16 Q. Did you have an understanding that investors were watching  
17 those litigations based on your comments?

18 A. I believe they were, yes.

19 Q. If I could show you what's been marked for identification  
20 as Defense Exhibit 1000-A.

21 MR. BERKE: Your Honor, in light of our discussions  
22 earlier, I'd like to just raise an issue with your Honor, I  
23 think just to be in fairness given the discussion we had, this  
24 is not an issue that came up and I can put a page on the screen  
25 about this exhibit before I go forward or ask your Honor about



H3K3WAL2

Engles - cross

1 it.

2 THE COURT: All right. Do you want to put a page up.

3 MR. BERKE: Let me do that, your Honor, and you see  
4 what it is. The first page and if we can go to page 29. And  
5 if you see the lower-right-hand corner in particular, your  
6 Honor.

7 THE COURT: I see.

8 MR. BERKE: It continues on the next page as well.

9 THE COURT: The comments attributed to the individual  
10 would seem to be covered by my prior ruling.

11 MR. BERKE: Okay, your Honor. Thank you. Your Honor,  
12 while we have the witness here if I can do one thing. If we  
13 can put that back up for identification.

14 Q. Sir, was it common for you to do a regular financial  
15 business view and outlook for the board of directors?

16 A. Yes, we did it at every board meeting.

17 Q. You'd use slides to do that, correct?

18 A. Yes, we did.

19 MR. BERKE: Thank you. You can take that down.

20 A. I should rephrase that. We did it every regularly  
21 scheduled board meeting.

22 Q. Now if I can direct your attention, sir, to what's been  
23 marked for identification as GX 462.

24 Sir, do you see that this is minutes of a board of  
25 directors for Dean Foods?

H3K3WAL2

Engles - cross

1 A. Yes, I do.

2 Q. It's dated May 17, 2012, correct?

3 A. Yes.

4 MR. BERKE: Your Honor, I'd offer in evidence what's  
5 been marked for identification as Government Exhibit 462.

6 MR. GOLDMAN: No objection.

7 THE COURT: Received.

8 (Government's Exhibit 462 received in evidence)

9 MR. BERKE: If I may publish it.

10 Q. This is minutes of a board of directors meeting that took  
11 place on May 17, 2012, correct?

12 A. Yes, it is.

13 Q. In the corporate offices in Dallas, correct?

14 A. Correct.

15 Q. Mr. Davis was there, correct?

16 A. Yes, he was.

17 Q. Among the other board members?

18 A. Uh-huh.

19 Q. Do you recall at this time, you again spoke about the  
20 WhiteWave spinoff?

21 A. If you would --

22 Q. Let me show you this.

23 A. -- refresh my recollection, please.

24 Q. If we can go to page four, first about 10 lines down from  
25 the top of the page. You see in the middle it notes that

H3K3WAL2

Engles - cross

1 Mr. Engles reviewed leverage consideration and the additional  
2 flexibility afforded by declining leverage levels.

3 Again, that's the debt ratio we were talking about,  
4 correct?

5 A. Yes.

6 Q. Mr. Magro, and that's your investment banker who had been  
7 at Bank of America at this time and he changed to a different  
8 firm, do you remember?

9 A. He was at Evercore at this time.

10 Q. That's a boutique investment banking advisor, correct?

11 A. Yes.

12 Q. It says "Mr. Magro then discussed a potential separation of  
13 the company's business platforms and the potential value  
14 creation opportunity that such a separation may afford."  
15 Correct?

16 A. Yes.

17 Q. Then, among other things, you're talking about the spinoff  
18 of WhiteWave if you go down. Do you see that, sir?

19 A. Yes, I do.

20 Q. If I could go to the action taken, if we can go to page  
21 four. Beginning at the bottom of page four and resolution,  
22 that's when the board agrees to take action, correct?

23 A. Correct.

24 Q. You see that what you're doing at this time is you're  
25 saying that the officers are authorized to continue an analysis

H3K3WAL2

Engles - cross

1 of, just to be clear, saying continue, because there had been  
2 an ongoing analysis of the potential of a WhiteWave spinoff,  
3 correct?

4 A. Correct.

5 Q. And commence the work associated with the potential  
6 separation transactions set forth in the materials previously  
7 distributed to the board. Is that correct, sir?

8 A. That is correct.

9 Q. Again, decision had not yet been made to actually have the  
10 spinoff for the IPO, but you're now deciding at this board  
11 meeting you are going to start doing more work with that goal  
12 in mind to potentially do it. Fair statement?

13 A. Fair.

14 Q. Can I now show you, sir, now I'd like to go forward a  
15 little further in time. Do you recall in May and June of 2012,  
16 you increased your public appearances substantially and your  
17 statements about WhiteWave in particular?

18 A. I certainly appeared publicly during those months. I don't  
19 know if it was more or less than I normally did, but I  
20 certainly appeared publicly. And yes, WhiteWave was much more  
21 of a topic following our May earnings call than it had been  
22 prior to that time.

23 Q. So let me show you, remember you were asked on direct about  
24 your attendance at a Bernstein conference at the end of  
25 May 2012?

H3K3WAL2

Engles - cross

1 A. Yes, I do.

2 Q. If we can publish or put on the screen what's already in  
3 evidence as Government Exhibit 534.

4 Again, this is the transcript of the Bernstein  
5 conference, correct?

6 A. Correct.

7 Q. Again, information here publicly available, correct?

8 A. Yes.

9 Q. If we can go to page 199. There is a question about by  
10 Alicia Howard.

11 A. Alexia Howard, yes.

12 Q. She was an analyst at Sanford Bernstein?

13 A. Correct.

14 Q. I think we have to go a little further in her questions.  
15 I'm sorry. She was the moderator of this conference, correct?

16 A. Yes, and she was also the analyst that covered us at  
17 Sanford Bernstein.

18 Q. We have to go to the bottom of page 198, there was another  
19 question from her. So, and she asked "One of the questions  
20 that investors are most curious about is the question of  
21 whether the WhiteWave business can be split off from the rest  
22 of the company. And I think you mentioned on last earnings  
23 call that's something that you and the board consider on a  
24 regular basis. Could you tell us a little more about the  
25 criteria they use to value each different part of the business

H3K3WAL2

Engles - cross

1 of the comparable companies."

2 Is that correct, sir?

3 A. That is correct, yes.

4 Q. Then she goes on at the end "And what criteria would you  
5 think about in terms of when it might be possible or  
6 appropriate to split off the WhiteWave business further down  
7 the road." Correct?

8 A. Yes.

9 Q. Now if we go to your answer. Do you see top of the  
10 paragraph and you see where you say the very -- can you read  
11 the very first sentence?

12 A. Yes. "I think that is perhaps one of the most pressing  
13 topics of the day for us as a company. And it really comes  
14 back to the fact that when you go back and" --

15 Q. No, that's the first sentence. We can go further in a  
16 second.

17 Did that reflect your true views at that time, that in  
18 May 30, 2012, that that was the most pressing topic of the day  
19 for the company?

20 A. Yes, it did.

21 Q. Sir, I think there's other parts of your answers that I  
22 think actually you addressed in your direct testimony but that  
23 also reflect WhiteWave.

24 Now, do you recall in May 2012 that you appeared on a  
25 very popular -- or a show called Squawk Box?

H3K3WAL2

Engles - cross

1 A. I do recall that, yes.

2 Q. And for those not familiar, can you describe what Squawk  
3 Box is?

4 A. Squawk Box is a show hosted by a gentleman named Jim Cramer  
5 who is a very interesting financial analyst and very engaging  
6 guy. He has a television show that's a daily television show.

7 Q. So you're familiar with Mad Money, correct?

8 A. Yes.

9 Q. That's the Jim Cramer show, Mad Money?

10 A. Yes.

11 Q. Is Squawk Box a show on CNBC that is very popular?

12 A. You asked me about Squawk Box.

13 Q. I did. We're going to do Mad Money next. You appeared on  
14 both?

15 A. And he hosts both. So hence my confusion.

16 Q. Good.

17 A. I do not remember my experience on Squawk Box.

18 Q. Do you recall it was your first time -- so you just don't  
19 recall it?

20 A. Well, I do recall a -- I do recall a visit with I believe  
21 Carl Quintanilla.

22 MR. BERKE: Let me show you what's been marked for  
23 identification as Defense Exhibit 2006, if I may. If we can go  
24 to page two. This is just for you, sir. If we can go down to  
25 the next page too. You can see what it is.

H3K3WAL2

Engles - cross

1 Now if we can go to the first page.

2 Q. My question to you is, do you recall that in early  
3 May 2012, you, sir, appeared on Squawk Box?

4 A. Yes, I do.

5 Q. Do you recall, sir, that you had not appeared on that show  
6 in a long time?

7 A. Yes.

8 Q. Do you recall that it was remarked during your interview it  
9 had been 10 years since you had last appeared?

10 A. Yes, I have a general recollection of that.

11 Q. Now, do you recall, sir, that you appeared later that month  
12 also in May on Jim Cramer's Mad Money?

13 A. Yes, I do recall.

14 MR. BERKE: Your Honor, if I may offer Defense Exhibit  
15 2031. We discussed this with the government. It's Mr. Engles'  
16 interview on the show that contains just his interview, not the  
17 preceding, and we would offer Defense Exhibit 2031 and ask to  
18 play it for the jury.

19 THE COURT: Any objection?

20 MR. GOLDMAN: No objection.

21 THE COURT: Received.

22 (Defendant's Exhibit 2031 received in evidence)

23 (Video recording playing)

24 THE COURT: We're going to take our midmorning break.

25 Ladies and gentlemen, please do not discuss the case among



H3K3WAL2

Engles - cross

1 yourselves or with anyone. We'll be back in action in 10  
2 minutes. Thank you.

3 (Jury excused)

4 (Continued on next page)

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H3K3WAL2

Engles - cross

1 THE COURT: Before we break, I have Court Exhibit no.  
2 3, which is a note from the Juror No. 16, the same juror who  
3 sent me the note that was marked as Court Exhibit No. 2. Over  
4 the break I'm going to invite counsel to review the note. And  
5 I plan at the end of the day today to, when we excuse the  
6 jurors, to have her remain behind and then excuse her as an  
7 alternate juror.

8 MR. GOLDMAN: Your Honor --

9 THE COURT: I'll see you in 10 minutes.

10 MR. GOLDMAN: We want to know how much more Mr. Berke  
11 may have on cross because Mr. Engles has rearranged his travel,  
12 but we'd like to finish by the lunch break if possible.

13 MR. BERKE: I'm trying. I think I have an hour, maybe  
14 an hour and a little bit of change. But it should be very  
15 doable.

16 MR. GOLDMAN: We'll have some redirect. So I don't  
17 know whether --

18 THE COURT: Okay. See you in 10 minutes.

19 (Recess)

20 THE COURT: Any objection to dismissing the juror at  
21 the end of the day?

22 MR. GOLDMAN: No.

23 MR. BERKE: No objection, your Honor.

24 THE COURT: Thank you.

25 (Continued on next page)

H3K3WAL2

Engles - cross

1 (Jury present)

2 BY MR. BERKE:

3 Q. Mr. Engles, fair to say that your appearance on Mad Money  
4 was positively received?

5 MR. GOLDMAN: Objection, your Honor.

6 Q. That was a positive event?

7 THE COURT: Sustained. Sustained.

8 Q. Did you view that appearance as a positive event for the  
9 company?

10 A. Yes.

11 Q. You recall that at the end of the interview, Jim Cramer  
12 says that he thinks that if there is a spinoff the stock could  
13 go to 20? Do you recall that?

14 A. I do, yes.

15 Q. And the stock at that time was significantly below 20,  
16 correct?

17 A. I don't recall exactly where it was, but yes, it was below  
18 20.

19 Q. Your response was "that's constructive"?

20 A. Yes.

21 Q. Sir, again, do you recall the date of this interview was  
22 May 31, 2012?

23 A. I believe that's about the right time frame, yes.

24 Q. Again, at this time, we saw the board had authorized  
25 continuing to do steps to analyze the possible transaction, but

H3K3WAL2

Engles - cross

1 it had not approved the transaction yet, correct?

2 A. That is correct.

3 Q. And ultimately, the IPO was announced on August 7, 2012,  
4 correct?

5 A. That's correct, yes.

6 THE COURT: When you say the IPO, would that include  
7 the fact of the spinoff?

8 THE WITNESS: It would have included -- it included  
9 our intention to spin following the IPO, yes.

10 THE COURT: All right.

11 MR. BERKE: Thank you.

12 THE COURT: So it would be an initial public offering  
13 of the shares of new WhiteWave.

14 THE WITNESS: Yes.

15 THE COURT: Okay, go ahead.

16 MR. BERKE: Thank you, Judge.

17 Q. Can I show you what's been marked for identification as DX  
18 1040. This is a financial business overview and 2012 outlook  
19 dated November 15, 2012, correct?

20 A. Yes, it is.

21 Q. Can I show you pages 30 and 36.

22 A. Yes.

23 (Continued on next page)

H3kdwal3

Engles - cross

1 A. Yes.

2 Q. And 36.

3 (Pause)

4 And this is part of the presentation to the board,  
5 correct?

6 A. Yes, it is.

7 MR. BERKE: Your Honor, I would ask to introduce as  
8 what I'll call Defense Exhibit 1040A the first page, page 30,  
9 and page 36 of the exhibit.

10 THE COURT: Any objection?

11 MR. GOLDMAN: No objection, your Honor.

12 THE COURT: Received.

13 (Defendant's Exhibit 1040A, pages 30 and 36, received  
14 in evidence)

15 MR. BERKE: May I publish it, your Honor?

16 THE COURT: You may.

17 Q. OK. And again, sir, so this is a November 15, 2012 board  
18 meeting, financial business overview and 2012 outlook, correct,  
19 sir?

20 A. Yes, it is.

21 Q. And this follows the August 7th announcement of the IPO, of  
22 the initial public offering we talked about, correct?

23 A. Yes, it does.

24 Q. OK. I'd like to direct your attention to page 30 of this  
25 exhibit.

H3kdwal3

Engles - cross

1 MR. BERKE: OK. Mr. McLeod, can you make that as big  
2 as you can?

3 Your Honor, may I approach the screen to point out  
4 some things? I think it may be helpful, given the nature of  
5 the chart.

6 THE COURT: You may.

7 MR. BERKE: Thank you, Judge.

8 MR. GOLDMAN: While he is doing that, I just wanted to  
9 clarify only pages 30 and 36 came in as 1040A and B, right?

10 MR. BERKE: I introduced the entire exhibit as 1040A,  
11 which is the cover sheet and page 30 and 36, calling that  
12 Exhibit 1040A.

13 MR. GOLDMAN: Did you intend to introduce the whole  
14 document or just those two pages?

15 MR. BERKE: Those two pages. I am happy to introduce  
16 the whole document if you should wish.

17 THE COURT: You offered the cover page --

18 MR. BERKE: The cover and two pages.

19 THE COURT: -- and two pages.

20 MR. GOLDMAN: That is fine. That's where we are at.

21 THE COURT: Proceed.

22 MR. BERKE: Thank you, Judge.

23 BY MR. BERKE:

24 Q. And, Mr. Engles, can you see this, because if you would  
25 rather stand, as well? Whatever --

H3kdwal3

Engles - cross

1 A. I can see just fine.

2 THE COURT: You can stand if you wish to.

3 THE WITNESS: No. I can see just fine.

4 Q. OK. So you see where it says, up high, "Investors are  
5 playing tug-of-war with DF stock?"

6 A. Yes.

7 Q. There is, again, in November looking back to what happened  
8 between the period of at least, you know, throughout 2012,  
9 correct?

10 A. Yes.

11 Q. And you see on the left side, it says "Excitement Over:  
12 Strong performance value unlock."

13 A. Yes.

14 Q. And, again, that's where people felt very excited about the  
15 potential for WhiteWave, correct?

16 A. Yes.

17 Q. And on the right hand it said, "Concern Over: Rising dairy  
18 forecasts."

19 A. Yes.

20 Q. And we talked a little bit about that issue on Thursday.  
21 And, again, there was a problem with milk prices going up,  
22 correct?

23 A. Well, the issue here was slightly different. The issue  
24 here during this time period was you will recall there was a  
25 very bad drought in the summer of 2012 and feed prices were

H3kdwal3

Engles - cross

1 going up.

2 Q. Right. I'm sorry.

3 A. And people were concerned that milk prices would then rise.

4 Q. And, in fact, it refers to that lower. So the rising dairy  
5 forecast because, as you correct, the grain prices were going  
6 to go higher, so the greater cost, lower profits, correct?

7 A. Greater cost would drive up the milk prices, yes.

8 Q. And then "Retailer Pressure," what is that, sir?

9 A. Concern that we would end up back in the same place where  
10 the retailers were deeply discounting milk.

11 Q. And "Weak milk category volumes."

12 A. Yes.

13 Q. What did that refer to, sir?

14 A. For quite some time, I think it has continued ever since  
15 the financial crisis, milk volumes -- total amount of milk sold  
16 has drifted down.

17 Q. And, sir, you see -- so now we have May here and June. If  
18 you can see that?

19 A. Yes.

20 Q. And you recall May, we went over a variety of statements  
21 you made and public appearances. The stock price of Dean Foods  
22 was climbing, it started to climb around this period through  
23 June it kept going up leading into July. Do you see that on  
24 the chart, sir?

25 A. Yes, I do.



H3kdwal3

Engles - cross

1 Q. Then when we are in July and August, you begin to see the  
2 stock price, notwithstanding -- you didn't have any contrary  
3 statements about WhiteWave during that period, correct?

4 A. No.

5 Q. But the stock price was beginning to fall as part of this  
6 tug of war with investors, correct?

7 A. Yes.

8 Q. So, again, we see it reaching a peak and if you look to  
9 what is roughly shortly sometime early in July, and then coming  
10 down in the July and August time period, correct?

11 A. Yes.

12 Q. And on the chart it refers to the drought that you  
13 mentioned, correct?

14 A. Yes.

15 Q. The USDA crop report revisions, correct?

16 A. Yes.

17 Q. And it continues to come down through July and August and  
18 stays relatively low going into August 7th, when you announce  
19 the initial public offering and the intent to spin off  
20 WhiteWave, correct?

21 A. That is correct, yes.

22 Q. And do you recall, sir -- can you recall, again, in terms  
23 of the tug of war, do you recall you yourself participating in  
24 discussions about how the stock was falling while at the same  
25 time WhiteWave was in the air, as it were?

H3kdwal3

Engles - cross

1 A. I actually don't recall that, having those discussions.

2 Q. Now let me show you, sir, slide 36.

3 Now, slide 36 is the top 15 -- you see at the top, it  
4 says, "Top 15 have increased their cumulative holdings to  
5 46 percent?"

6 A. Yes.

7 Q. I just want to break it up. These are the top 15  
8 shareholders in Dean Foods' stock, correct?

9 A. That is correct, yes.

10 Q. And if you go to the column that says "Position as of  
11 3/30/2012."

12 A. Yes.

13 Q. OK. And if you go down, it adds up and it shows that your  
14 top 15 investors had 33 percent of the market share of Dean  
15 Foods, correct?

16 A. That's correct, yes.

17 Q. And if you look at the position on June 30, 2012, your top  
18 15 had increased it from 33 percent to 40 percent of the market  
19 share, is that correct?

20 A. Yes, that's correct.

21 Q. And you would agree, sir, that reflects that your -- and  
22 the top 15 tend to be your most sophisticated investors who  
23 best understand Dean Foods as a general matter, correct?

24 A. Well, they are also sophisticated investors, and they all  
25 have the ability to do the work necessary to understand the

H3kdwal3

Engles - cross

1 business.

2 Q. OK. And you understood that this reflects that these  
3 investors, again cumulatively, had increased their holding  
4 based on their evaluations of the company, as we just  
5 indicated, from March 31 to June 30 in the numbers, right?

6 A. Yes.

7 Q. We will come back to that in one second.

8 MR. BERKE: We could take it down for now, Mr. McLeod.  
9 Thank you.

10 Q. And fair to say that the announcement on August 7th was  
11 very well received, as indicated in the chart?

12 A. Yes, it was.

13 Q. You recall the stock price went up roughly 40 percent?

14 A. That's correct.

15 Q. And you made statements to the board and others about how  
16 pleased you were that it had been so well received, correct?

17 A. I believe I did, yes.

18 Q. Now, sir, do you recall that after the announcement, you  
19 took steps to show to the investment community how good you  
20 felt about the announcement?

21 A. I don't recall that, no.

22 Q. Let me show you what's been marked for identification as  
23 GX706-M.

24 And, sir, do you recall that -- do you recognize that  
25 as a Dean Foods' press release issued on August 10, 2012?

H3kdwal3

Engles - cross

1 A. Yes.

2 MR. BERKE: Your Honor, I would offer into evidence  
3 GX706-M.

4 MR. GOLDMAN: No objection.

5 THE COURT: Received.

6 (Government's Exhibit 706-M received in evidence)

7 MR. BERKE: If I may publish it?

8 Q. Again, this says, "Dean Foods announces Chief Executive  
9 Officer exercised options with intent to hold shares."

10 And that is you, of course, correct, sir?

11 A. That's me, yes.

12 Q. And if you go down to the substance, it says, "Dean Foods  
13 today announced that Gregg Engles, Chairman and Chief Executive  
14 Officer, exercised stock options for approximately 950,000  
15 shares in a net exercise transaction with the company."

16 A. Yes.

17 Q. "He intends to hold all of the shares of Dean Foods common  
18 stock obtained through the option exercise net of those shares  
19 necessary to cover the exercise price and related tax  
20 liability."

21 A. Yes.

22 Q. And then it goes on at the end to say, "Following the  
23 completion of the exercise, Mr. Engles will hold approximately  
24 2.8" and change "million shares of Dean Foods common stock,"  
25 correct, sir?

H3kdwal3

Engles - cross

1 A. Yes.

2 Q. And when you made this announcement -- the company made  
3 this announcement, you understood that that would be  
4 perceived -- well, was it your intent for that to be perceived  
5 by the market as a positive endorsement of the recent decisions  
6 by you, sir, the Chief Executive Officer?

7 A. No. It was just intended to communicate what the Chief  
8 Executive Officer was doing with his shares.

9 Q. Right. But did you understand that your statement that you  
10 were going to exercise and hold the shares, as opposed to sell  
11 them, would generally be positively received?

12 A. Certainly more positive than the alternative, yes.

13 Q. And you understood that very sophisticated investors looked  
14 to whether senior management was buying their stock or selling  
15 their stock as one indicator of how they feel about the stock?

16 A. Yes.

17 Q. And, sir, if I can -- and you know -- if we can go back to  
18 the slide we were looking at, which is Defense Exhibit 1040A at  
19 36.

20 I'm sorry. There it is, yes.

21 And now, if we can -- sir, after your announcement of  
22 the IPO and after the other announcements we've talked about,  
23 do you see on this -- if we could make it a little bigger,  
24 Mr. McLeod, if possible? Bless you. Thank you. You see that  
25 that says, "Current position as of September 30, 2012?"

H3kdwal3

Engles - cross

1 A. Yes.

2 Q. And you see that your top 15 increased their position from  
3 40 percent all the way to 46 percent, correct?

4 A. Yes, that is correct.

5 Q. So your top 15 were hold nearly half -- nearly 50 -- well,  
6 46 percent, a substantial number?

7 A. Yes.

8 Q. And can I show you now, sir, what's marked for  
9 identification as Defense Exhibit 657.

10 And, sir, do you recognize this as your  
11 self-evaluation for 2012? We looked at one for an earlier  
12 year.

13 A. Yes, I do.

14 Q. This is a document kept in the regular course of business  
15 of Dean Foods, correct?

16 A. Yes, it is.

17 MR. BERKE: Your Honor, I would offer Defense Exhibit  
18 657.

19 MR. GOLDMAN: Your Honor, I hate to do this but could  
20 we have a short sidebar, please?

21 THE COURT: All right.

22 (Continued on next page)

H3kdwal3

Engles - cross

1 (At the sidebar)

2 MR. GOLDMAN: Your Honor, this is a document that is  
3 similar to one that came in last week after the Court went  
4 through some of the foundational questions about a business  
5 record. The government, the problem we have is that you can  
6 ask those questions that are foundational questions for a  
7 business record, but this is really an after-the-fact summary  
8 that's prepared via the CEO's secretary of his own  
9 self-evaluation. It's much more akin to a police report.

10 If you were to ask a police officer the same questions  
11 that you asked the witness, the foundational questions, was it  
12 kept in the matter of the regular course of business, etc., for  
13 a police report, the police officer would also agree with your  
14 Honor. But this document is an after-the-fact summary of the  
15 witness' assessment, and, therefore, we don't believe that it  
16 falls under the business records exception.

17 THE COURT: All right. Do you have the text of the  
18 document?

19 MR. BERKE: I do. Do you want me to put it on the  
20 screen, your Honor?

21 THE COURT: Yes. Is it in a binder?

22 MR. BERKE: There were so many binders. We have them.

23 THE COURT: If you would just give me a clean copy of  
24 it, that would be best.

25 (In open court)

H3kdwal3

Engles - cross

1 THE COURT: Ladies and gentlemen, feel free to stand  
2 up and stretch, if that would help.

3 (At the sidebar)

4 MR. BERKE: And it is on page 4. It is question 4  
5 about investment community.

6 MR. GOLDMAN: That's what he intends to introduce.

7 THE COURT: I understand.

8 (Pause)

9 It seems to me this is -- this document was prepared  
10 how long after the events?

11 MR. BERKE: I believe this --

12 THE COURT: Or the announcement of the IPO, I should  
13 say.

14 MR. BERKE: Yes. I believe this was prepared in  
15 January of 2013.

16 THE COURT: Right. All right. It is prepared  
17 substantially after the fact and gives a retrospective summary  
18 evaluation of this witness' belief of his own actions over a  
19 long period of time. So, you know, in about 12 lines of text,  
20 he summarizes an extended period of interaction with analysts,  
21 who he refers to we had for years stated our intent to separate  
22 WhiteWave and Dean. And he goes on, "True to our word."

23 What I'll allow you to do is to ask questions of the  
24 witness about his present-day recollection, and depending on  
25 what his answers are, you can use this to see whether you can



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Engles - cross

1 refresh his recollection.

2 MR. BERKE: And if not, can I use it for impeachment,  
3 your Honor?

4 THE COURT: We'll see when we get to that point.

5 MR. BERKE: OK.

6 THE COURT: Here's your binder.

7 MR. BERKE: I'm sorry. Thank you.

8 Your Honor, if you would like a set of binders, we are  
9 happy to do it.

10 THE COURT: No. I'm fine. Thank you.

11 (Continued on next page)

H3kdwal3

Engles - cross

1 (In open court)

2 THE COURT: All right. You may proceed, Mr. Berke.

3 MR. BERKE: Thank you, Judge.

4 BY MR. BERKE:

5 Q. Sir, is it fair to say that the company had indicated for  
6 some time of your desire or your intent to separate WhiteWave  
7 from Dean to unlock the value of that branded business?

8 A. Yes.

9 Q. And is it also fair to say that you moved aggressively to  
10 do so when your leverage ratios declined?

11 A. Yes. We moved aggressively to do so when we had the  
12 opportunity.

13 Q. Thank you, sir.

14 I want to very quickly take you back to some earlier  
15 quarters that you were asked about on your direct. I will try  
16 to identify it, but we are going to go through different time  
17 periods just so you are aware.

18 A. OK.

19 Q. Do you recall, sir, that you were asked about the earnings  
20 announcement on February 13, 2008? All the way back in time  
21 now, 2008.

22 A. I recall being shown that, yes.

23 Q. OK. And do you recall, sir, that that period of time was a  
24 very volatile period for Dean Foods and the industry?

25 A. Yes, in fact it was.

H3kdwal3

Engles - cross

1 Q. And do you recall, sir, that you indicated to the market  
2 your intent to issue guidance, in part, because it was such a  
3 volatile period?

4 A. Did you say my -- would you rephrase that, please?

5 Q. Actually, let me show you a document.

6 Can I show you what's been marked for identification  
7 GX702-C? This is in 2008, correct, sir?

8 A. Yes, this is 2008.

9 Q. OK. This is the announcement of fourth quarter earnings,  
10 correct?

11 A. Yes. This is fourth quarter earnings.

12 Q. OK. Could I show you the second page, first paragraph.

13 A. Yes.

14 Q. And then the next paragraph.

15 (Pause)

16 And there is a paragraph that begins, "Turning to the  
17 outlook for 2008."

18 A. Yes.

19 MR. GOLDMAN: Your Honor, I don't think this document  
20 is in evidence, and I'm not sure that there is any refreshing  
21 that is --

22 MR. BERKE: Your Honor, I would offer Government  
23 Exhibit 702-C.

24 MR. GOLDMAN: No objection.

25 THE COURT: Received.

H3kdwal3

Engles - cross

1 (Government's Exhibit 702-C received in evidence)

2 MR. BERKE: Mr. McLeod, if we could just publish the  
3 top of the first page and then back to that paragraph.

4 Thank you, Judge.

5 Q. OK. That is your announcement for fourth quarter year-end  
6 2007, correct?

7 A. Yes, it is.

8 Q. Now if we could go to the second page, the paragraph  
9 beginning "Turning to the outlook."

10 You see for this period you say, "Turning to the  
11 outlook for 2008, it's clear that our results will continue to  
12 be driven primary by swings in the dairy commodity markets."

13 A. Yes.

14 Q. And then you go down to the last sentence of that  
15 paragraph, "Faced with these highly volatile and uncertain  
16 markets, we believe it is prudent to provide a wider guidance  
17 range for quarterly guidance than previous practice, and  
18 limited guidance for the full year," correct?

19 A. Yes.

20 Q. Stated simply, is it fair to say giving guidance is giving  
21 some indication of what you expect your earnings will be based  
22 on where you are at that time in the quarter?

23 A. Yes. That's what guidance consists of.

24 Q. Now, sir -- thank you, Mr. McLeod. If we could go to  
25 what's been marked as DX2176, for identification.

H3kdwal3

Engles - cross

1 Sir, do you recognize that as a Dean Foods' press  
2 release issued on February 29, 2008?

3 A. Yes, I do.

4 MR. BERKE: Your Honor, I would offer Defense Exhibit  
5 2176 into evidence.

6 MR. GOLDMAN: No objection.

7 THE COURT: Received.

8 (Defendant's Exhibit 2176 received in evidence)

9 MR. BERKE: May I publish it, your Honor?

10 THE COURT: You may.

11 Q. Again, that reflects it is a press release issued by the  
12 company to the market, correct?

13 A. Correct.

14 Q. And if you -- and you recognize this, sir, that this is  
15 guidance that you're giving, that you had said you would give  
16 in the earlier announcement?

17 A. Well, this -- we're announcing that we sold stock.

18 Q. I'm sorry.

19 A. Or intend to sell stock.

20 Q. If we could go to page 2, under "Forward Outlook."

21 You see, sir, where it says, "As a result, the company  
22 is reiterating its previously issued guidance of between \$0.15  
23 and \$0.20 per share for the first quarter and at least \$1.20  
24 per share for the full year 2008," correct?

25 A. Yes.

H3kdwal3

Engles - cross

1 Q. And when you were giving guidance like that, you were being  
2 honest with the market; that's your best guess of where you are  
3 at that time, correct?

4 A. Yes, it is.

5 Q. And that is your obligation and you are complying with that  
6 obligation, correct?

7 A. Yes.

8 Q. And just on this same period, do you recall, sir, that you  
9 had asked about an equity offering that you borrowed money to  
10 have for the company; do you recall that?

11 A. We sold shares.

12 Q. Yes.

13 A. Yes.

14 Q. And when you announced the equity offering, the price of  
15 Dean Foods went down substantially, correct?

16 A. I don't recall that specifically but it's not unusual.

17 Q. Let me show you Defense Exhibit 2177, for identification.

18 You see what it is. I want to show you the third line  
19 from the bottom.

20 (Pause)

21 If you would look at the date as well.

22 My question to you, sir: Does that refresh your  
23 recollection that when you had your equity offering, the price  
24 of Dean Foods fell down substantially?

25 A. Yes.

H3kdwal3

Engles - cross

1 Q. And now I want to go forward to -- do you recall that in  
2 June of 2008, you revised your earnings?

3 A. How do you mean, "revised"?

4 Q. You provided additional -- additional earnings?

5 Let me show you what's been identified -- marked for  
6 identification as Defense Exhibit 411. I may have misspoke.

7 My question is: Do you understand that you provided  
8 revised guidance to the market in June of 2008?

9 A. Yes.

10 Q. And if I could show you Defense Exhibit 411, do you  
11 recognize that as your revised guidance?

12 A. Yes.

13 MR. BERKE: And if we could just publish it briefly.

14 MR. GOLDMAN: It is already in evidence I believe as  
15 702-L, Government Exhibit 702-L.

16 MR. BERKE: OK.

17 MR. GOLDMAN: The same thing, right?

18 MR. BERKE: If that is in, that is fine.

19 MR. GOLDMAN: Your Honor, I don't have an objection to  
20 this.

21 MR. BERKE: I am happy to use GX702-L, for simplicity.

22 THE COURT: Yes.

23 MR. BERKE: If we can publish it?

24 THE COURT: Yes.

25 BY MR. BERKE:

H3kdwal3

Engles - cross

1 Q. Again, you see in the first paragraph, you indicate that  
2 you're expecting -- you're giving revised guidances from 26  
3 cents to 31, correct?

4 A. No. We're revising our guidance to say it will be at least  
5 32, as opposed to our previous guidance of 26 to 31.

6 Q. Thank you, Mr. Engles. That is correct.

7 Again, when you did that, that is because that was  
8 your best guess at the time of what it would be, correct?

9 A. Yes.

10 Q. This is only a guess based on what you know at that time,  
11 correct?

12 A. That's correct.

13 Q. Sir, am I right that you believed you would have discussed  
14 this with the board at the board meeting that followed this  
15 announcement?

16 A. That would be typical.

17 Q. Sir, now let me go to your earnings announcement on  
18 November 4, 2008. And could I show you what has been marked as  
19 Defense Exhibit 601-C, for identification. 601. Thanks.

20 Again, this is your Dean Foods earning announcement  
21 for third quarter 2008, dated November 4, 2008, correct?

22 A. Yes, that's correct.

23 MR. BERKE: Your Honor, may I offer Defense Exhibit --  
24 I'm sorry, it is Government Exhibit 601-C, for identification.  
25 I offer into evidence.



H3kdwal3

Engles - cross

1 MR. GOLDMAN: No objection.

2 THE COURT: Received.

3 (Government's Exhibit 601-C received in evidence)

4 MR. BERKE: And if we may publish it. It is  
5 published. OK.

6 Q. You see, sir, that that is the earnings announcement on  
7 November 4, 2008, correct?

8 A. Yes.

9 MR. BERKE: And could we go to page 8, last two lines,  
10 beginning, "The third quarter highlights."

11 (Pause)

12 A. OK.

13 Q. It goes over two pages. Sir, do you see where it says  
14 here, "The third quarter highlights how far the business has  
15 moved in the past year. We look forward to successfully  
16 closing out 2008 with what we expect to be a solid forth  
17 quarter. Looking ahead to next year, we're very excited about  
18 the impact we expect our cost saving initiatives to have on the  
19 DSD dairy business. And as you consider," and then you go on  
20 to talk about factors. Is that correct, sir, that's what it  
21 says?

22 A. Yes, that's what it says.

23 Q. Is it fair to say November 4, 2008 was a time that was  
24 essentially in the middle of the financial crisis?

25 A. Yes. The financial crisis was getting geared up.

H3kdwal3

Engles - cross

1 Q. And it was a volatile time in the markets?

2 A. Yes, it was.

3 Q. Fair to say that you wanted to provide a positive statement  
4 on behalf of the company to the investors in that market?

5 A. Well, our business was performing well in that period of  
6 time, and we were communicating that to the market.

7 Q. And you were particularly focused, am I right, you were  
8 particularly focused on it given how volatile the markets were  
9 in that time?

10 A. I think this was consistent with our practice in times of  
11 volatility or not. We tried to accurately portray for the  
12 market how our business was performing.

13 Q. OK. If you go to page 6, second-to-last paragraph, and  
14 just show enough of it to see that it is Jack Callahan speaking  
15 here.

16 In 2008, Jack Callahan was the CFO, correct?

17 A. That is correct, yes.

18 Q. If we could go to page 6, the second-to-last paragraph.

19 And, again, Mr. Callahan echoes your very positive  
20 message to say, we're very -- We expect to finish the year very  
21 much on track and expect to continue to deliver on the original  
22 guidance.

23 A. Yes.

24 Q. And it goes down further that -- well, again, also giving a  
25 positive message, correct?

H3kdwal3

Engles - cross

1 A. Yes. The message was positive for this quarter.

2 Q. And if we could go to what has been marked as GX702-Q, for  
3 identification.

4 And this is your press release that was also released  
5 for this quarter, correct?

6 A. Correct.

7 MR. BERKE: Your Honor, I would offer into evidence  
8 GX702-Q.

9 MR. GOLDMAN: No objection.

10 THE COURT: Received.

11 (Government's Exhibit 702-Q received in evidence)

12 MR. BERKE: Thank you, Judge. If I may publish it?

13 And go to the paragraph beginning, "The third quarter  
14 results."

15 A. Yes.

16 Q. And you see it quotes you, sir, as saying -- if we could go  
17 to the next page. I'm sorry.

18 Actually, I'm sorry, it is the first page. Thank you,  
19 Mr. McLeod.

20 Do you recall, sir, when we get to it, that the press  
21 release would have echoed the same positive comments, correct?

22 A. Yes, sir.

23 Q. Thank you, sir.

24 Now, do you recall, sir, going forward now, January  
25 '09, do you recall that in early 2009 the milk prices

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Engles - cross

1 collapsed?

2 A. Yes.

3 Q. And, again, collapsing milk prices, as we talked about on  
4 Thursday, is good for Dean Foods, correct?

5 A. Yes.

6 Q. Because that's one of your inputs, and when that goes down,  
7 profits in the future will go up, correct?

8 A. Well, profits go down when the milk price goes down before  
9 you've passed along that decrease to your customers, so your  
10 profits expand.

11 Q. OK. Again, that fact that your raw milk prices went down,  
12 or collapsed, that's publicly available, correct?

13 A. Yes.

14 Q. Sir, you talked about the Alpro acquisition in your direct  
15 testimony; do you recall that?

16 A. Yes.

17 Q. And the Dean Foods Company acquired Alpro, correct?

18 A. That's correct.

19 Q. And you're certainly familiar that often when an acquirer  
20 acquires a company, its own stock price will fall down,  
21 correct?

22 A. That sometimes happens, yes.

23 Q. And that's in fact what happened when Dean Foods acquired  
24 Alpro, its stock price fell, correct?

25 A. That's correct.

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Engles - cross

1 Q. Now, there came a point in time, sir, do you recall, that  
2 Mr. Callahan, your CFO, resigned as CFO?

3 A. Yes.

4 Q. And do you recall, sir, that that was the first week of  
5 November 2010, November 4th or 5th?

6 A. Yes.

7 Q. Do you recall, sir, that when you heard he was resigning,  
8 you were surprised he was resigning because you didn't think he  
9 was going to be resigning?

10 A. Yes, I was surprised.

11 Q. And he had earlier assured you that he was going to remain  
12 in his position, correct?

13 A. He had.

14 Q. Sir, now I want to go to May 8, 2012.

15 Well, actually, let me ask you this before we go  
16 there. Let me ask you, sir, about September 2012.

17 Do you recall that Dean Foods was looking -- was  
18 intending and had intended to sell its Morningstar division?

19 A. We had considered that, yes.

20 Q. And do you recall that in September of 2012, that -- and  
21 you had spoken to investment bankers about that, correct?

22 A. Yes.

23 Q. And when I say speak to investment bankers, there are a  
24 variety of banks that have investment banking firms, and you  
25 went around to speak to each one of them to see who you might

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Engles - cross

1 want to hire to participate in the sale if you did go forward  
2 with the sale, correct?

3 A. I think we did that with respect to the -- leading the IPO  
4 of WhiteWave. I think we had chosen Mr. Magro to lead the sale  
5 of Morningstar.

6 Q. Do you recall that the sale did involve contacting other  
7 bankers out there about the potential sale?

8 A. I believe the whole process of the WhiteWave-Alpro spin-off  
9 and the potential sale of Morningstar was discussed with a  
10 number of investment banks.

11 Q. OK. Let me show you what's been identified or marked for  
12 identification as Defense Exhibit 663.

13 Sir, do you recognize that as an email from you to Tom  
14 Davis?

15 A. Yes.

16 Q. Dated September 26, 2012?

17 A. Yes.

18 MR. BERKE: Your Honor, I would offer Defense Exhibit  
19 663 in evidence.

20 MR. GOLDMAN: No objection.

21 THE COURT: Received.

22 (Defendant's Exhibit 663 received in evidence)

23 BY MR. BERKE:

24 Q. You understand for these exhibits, we read them from the  
25 bottom up time-wise?

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Engles - cross

1 A. Sure.

2 Q. OK. If we can go to the bottom.

3 And this is you on September 26 sending an email to  
4 the board that says -- would you read it for me, sir?

5 A. Yes. "We received a media call from Reuters confirming  
6 that they have information about Dean Foods pursuing the sale  
7 of Morningstar. They have the information from several sources  
8 with a level of detail that we consider substantiated. We have  
9 a contingency plan in place that we are activating now which  
10 includes issuing an external statement once we see the story  
11 run, and conducting internal and customer communications as  
12 needed. We will send the story to you once we see it."

13 Q. And fair to say this was an unintended leak?

14 A. Unanticipated, yes.

15 Q. Unanticipated. And certainly not authorized?

16 A. No.

17 Q. That's why you are telling the board.

18 And do you recall -- if we could go to the response  
19 you received in this document. I think one below that. In the  
20 middle. Thank you.

21 So Mr. Davis responds just to you, and Steve Kemps is  
22 your general counsel, correct?

23 A. Yes.

24 Q. And he says, "That is not a surprise given how many people  
25 received a contact from our banker."

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Engles - cross

1 A. Yes.

2 Q. And did you understand when he said "people" to mean other  
3 bankers?

4 A. No.

5 Q. What did you understand him to mean?

6 A. Companies that had been approached to be potential  
7 acquirers of Morningstar.

8 Q. So other people in the industry or the community, correct?

9 A. Yes. And they probably all had bankers as well.

10 Q. And that's typically how these transactions would be done,  
11 correct?

12 A. Yes.

13 Q. OK. And if you could go to the top paragraph.

14 And then can you read your response, sir?

15 A. "I totally agree, Tom. Been hearing lots of chatter. At  
16 least we will try to get a sense of the market's reaction."

17 Q. And you're saying you respond that because you had spoken  
18 to so many companies and their bankers, that explains how it  
19 probably got leaked?

20 A. Yes.

21 Q. Now, sir, I want to take you to May.

22 Do you recall on May 9th, prior to announcing -- I'm  
23 sorry, May 9, 2012, prior to announcing to the market that you  
24 were going to take steps to pursue a possible WhiteWave  
25 spin-off, that you had been speaking to bankers?



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Engles - cross

1 A. Yes.

2 Q. And do you recall, sir, that -- do you recall during that  
3 period you spoke to a variety of different investment banks?

4 A. Yes.

5 Q. Morgan Stanley?

6 A. I believe so, yes.

7 Q. JPMorgan?

8 A. I believe so, yes.

9 Q. And you called and you actually even spoke to Merrill Lynch  
10 the actual day before, on May 8, 2012?

11 A. I don't recall that but it is certainly possible.

12 Q. Can I show you, just for identification, what's been marked  
13 as Defense Exhibit 5337?

14 And this is just for you, sir. And I would ask that  
15 you look at the very top of that first, and -- I'm sorry, the  
16 first entry in the chart.

17 And I ask, sir, does that refresh your memory that you  
18 had reached out to Merrill Lynch on May 8, 2012, the day before  
19 the announcement?

20 A. It doesn't refresh my recollection.

21 Q. OK. All right.

22 A. I may not have been the one if they were contacted --

23 Q. Understood. But, in any event, you understood in the  
24 period leading up to that you were reaching out to a variety of  
25 bankers?

H3kdwal3

Engles - cross

1 A. Yes.

2 Q. Sir, do you recall that on May 8th, the day before --  
3 May 8, 2012, the day before the May 9, 2012 announcement, the  
4 stock volume of Dean Foods spiked over 250 percent as to what  
5 it had been the day before?

6 A. I do not recall that.

7 Q. And -- thank you, sir.

8 Sir, you ultimately learned that other sophisticated  
9 investors purchased Dean Foods' stock prior to the  
10 August 7th announcement; is that a fair statement, other than  
11 the ones we've already talked about?

12 A. I don't recall learning that.

13 Q. Well, you understood -- you know, sir, that it's common  
14 that after a big transaction or IPO, that FINRA, the regulatory  
15 arm, would look to see who purchased stock leading up to that  
16 announcement?

17 A. Yes. I'm aware of that.

18 Q. And you are aware that, as is typical, they did that here,  
19 too?

20 A. Yes.

21 Q. And you recall that you, sir, were shown a list and asked  
22 if you recognized any of the people who had bought stock  
23 leading up to the announcement on August 7?

24 A. Yes.

25 Q. Sir, do you recall that one of the people you were asked

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Engles - cross

1 about was an individual who had been the former Dean Foods'  
2 Treasurer, Corey Olson?

3 A. Yes.

4 Q. And he was no longer involved with Dean Foods, so it is  
5 perfectly fine for him to buy stock, correct?

6 A. I don't know whether it was fine or not, but he was no  
7 longer involved with Dean Foods.

8 Q. What I mean by that is he was at that point decidedly the  
9 former treasurer. He had been out of his position for a while?

10 A. He had been gone from the company for quite a long time,  
11 yes.

12 Q. But he knew the company and knew it well, correct?

13 A. Yes, he did.

14 Q. Fair to call him a very sophisticated -- that he was very  
15 sophisticated in his understanding of Dean Foods given his long  
16 tenure as treasurer of the company?

17 A. Cory was a very knowledgeable person, yes.

18 Q. And you understood that he had purchased stock in Dean  
19 Foods leading to the August 7 WhiteWave announcement, correct?

20 A. I understood he was on the FINRA list.

21 Q. And the FINRA list was the list of people they showed you  
22 who had shared -- who had purchased shares leading to that  
23 announcement, correct?

24 A. I don't know that for certain. I know that FINRA had an  
25 interest in those individuals, but they don't disclose why

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Engles - cross

1 they're interested.

2 Q. Was that your understanding at the time?

3 A. I believe that they were purchasers of the securities on  
4 the list, yes.

5 Q. And do you recall Theodore Strauss was somebody else on the  
6 list?

7 A. Yes.

8 Q. He was a longtime investment banker in Dallas?

9 A. Yes.

10 Q. Who -- and he knew you, correct?

11 A. Yes. We were acquainted.

12 Q. And he knew the company very well?

13 A. Yes, he did.

14 Q. Fair to call him a very sophisticated investor in Dean  
15 Foods?

16 A. He was a sophisticated investor, yes.

17 Q. And you understood that he was on the FINRA list as well?

18 A. I did.

19 THE COURT: So when you say "the FINRA list," this is  
20 a document that was received by the company in which FINRA made  
21 certain inquiries about what these individuals knew about the  
22 transaction?

23 THE WITNESS: I think it goes more along the lines of  
24 do you know these individuals, and, if so, describe the  
25 circumstances of your relationship with them and when you would

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Engles - cross

1 have spoken to them over some period of time.

2 THE COURT: All right. And are you told why this  
3 inquiry is being made?

4 THE WITNESS: No.

5 THE COURT: Are you told what information FINRA has  
6 about the activities of these individuals?

7 THE WITNESS: No.

8 THE COURT: OK. All right. Thank you.

9 BY MR. BERKE:

10 Q. Sir, I'd like to turn to -- you were asked some questions  
11 about trading windows, right? And that is a Dean Foods policy  
12 about when they have a trading window opened or closed,  
13 correct?

14 A. Yes.

15 Q. A trading window typically refers to, when the trading  
16 window is open, it is the general assumption that senior  
17 management and board members can trade in Dean Foods' stock  
18 unless they are otherwise prohibited for other reasons,  
19 correct?

20 A. Yes.

21 Q. And then the opening and closing of that is set by Dean  
22 Foods and its policy, correct?

23 A. That's correct.

24 Q. OK. If I could show you a document marked Defense Exhibit  
25 1125, for identification.

H3kdwal3

Engles - cross

1 And you recognize that as a corporate update, second  
2 quarter 2008, for the Board of Directors meeting?

3 A. Yes.

4 MR. BERKE: Your Honor, I would offer Defense Exhibit  
5 1125.

6 MR. GOLDMAN: No objection.

7 THE COURT: Received.

8 (Defendant's Exhibit 1125 received in evidence)

9 MR. BERKE: If I may publish it, your Honor?

10 THE COURT: You may.

11 MR. BERKE: Thank you.

12 BY MR. BERKE:

13 Q. And there it is. If we could go to page 27.

14 And, sir, we talked a lot on Thursday about investor  
15 relation meetings that would take place with senior management,  
16 investor relations, and investors, correct?

17 A. Yes.

18 Q. You see here this refers to a meeting with Wellington in  
19 Dallas on September 15th?

20 A. Yes.

21 Q. And also September 17th and 24th, investor meetings in  
22 Chicago in the Washington Baltimore area?

23 A. I think those were future events --

24 Q. Yes.

25 A. -- that were planned.

H3kdwal3

Engles - cross

1 Q. OK. That's in 2008, correct?

2 A. Yes.

3 Q. And if I could show you what's been identified as Defense  
4 Exhibit 666, for identification.

5 And, sir, you recognize that as an email from Rachel  
6 Gonzalez to a lot of other people at Dean Foods?

7 A. Yes.

8 Q. And if you go to the bottom of that.

9 And who is Rachel Gonzalez, sir?

10 A. She was our assistant general counsel.

11 Q. If you can just go to the gray line and see where it says  
12 "Subject: Trading Windows?"

13 A. Yes.

14 Q. The date of that is again, if I can go to the first page?

15 A. September the 12th, I believe.

16 MR. BERKE: Your Honor, I would offer Defense Exhibit  
17 666.

18 MR. GOLDMAN: No objection.

19 THE COURT: All right. 666 is received into evidence.

20 (Defendant's Exhibit 666 received in evidence)

21 THE COURT: Go ahead.

22 BY MR. BERKE:

23 Q. Sir, do you see that is on September 12, 2008. And if we  
24 go to the body of this, and it indicates that the trading  
25 window during this quarter of 2008 was going to close effective

H3kdwal3

Engles - cross

1 the close of business September 12th. Do you see that, sir?

2 A. Yep.

3 Q. Thank you.

4 MR. BERKE: OK. Thank you, Mr. McLeod.

5 Q. Mr. Engles, I want to ask you about Tom Davis.

6 A. OK.

7 Q. Now, you had been friends with Tom Davis for some time,  
8 correct?

9 A. Yes, I had.

10 Q. And is it fair to say you considered Mr. Davis to be a good  
11 friend?

12 A. Yes, I did.

13 Q. And do you recall that you were interviewed at some point  
14 by prosecutors in this case and the FBI about Mr. Davis?

15 A. Yes.

16 Q. And you understood that Mr. Davis was under investigation  
17 at the time, correct?

18 A. I believed so, yes.

19 Q. At that time you still considered him a good friend, true?

20 A. Yes. Mr. Davis was a friend of mine.

21 Q. And going back in time, you knew Mr. Davis -- you met him  
22 first professionally in his role as an investment banker,  
23 correct?

24 A. That is my recollection, yes.

25 Q. And he was your investor, you had said, you had indicated



H3kdwal3

Engles - cross

1 when you had initially worked at Suiza Foods? And I'm sure I'm  
2 mispronouncing it.

3 A. Suiza Foods. You did very well.

4 It was a company that we bought, a private company.

5 Q. OK. And he was your investment banker at the time?

6 A. We certainly discussed it with him. I don't remember if he  
7 actually did the work or not.

8 Q. But you had a close business relationship with him?

9 A. Correct.

10 Q. You had a high degree of respect for him?

11 A. I did.

12 Q. And this is predating whatever you may have learned about  
13 him in connection with this case.

14 And fair to say that Mr. Davis had a -- he had a good  
15 relationship with Jim Turner and John Muse, who were on your  
16 board?

17 A. Yes, he did.

18 Q. And you valued Mr. Davis' judgment?

19 A. Yes, I did.

20 Q. And you knew that Mr. Turner and Muse valued his judgment  
21 as well?

22 A. I believe so, yes.

23 Q. And fair to say that you thought Mr. Davis was prepared?

24 A. Excuse me?

25 Q. You thought he was generally prepared as a board member?

H3kdwal3

Engles - cross

1 A. Yes.

2 Q. And let me just be clear. There is a point in time when  
3 you asked him -- when he joined the Dean Foods board, correct?

4 A. Yes.

5 Q. That is something you supported, correct?

6 A. Yes. I asked him.

7 Q. And you thought it was because of his experience and how  
8 you viewed his abilities, correct?

9 A. Yes, and his knowledge of our company and the industry.

10 Q. And you viewed him to be a steady hand on the board?

11 A. Yes, I did.

12 Q. And you thought he was very valuable?

13 A. Yes.

14 Q. And partly this was based on his 20 years of experience as  
15 an investment banker?

16 A. Yes.

17 Q. And his -- you thought he had invaluable strategic insight;  
18 fair to say?

19 A. Tom was a good thinker.

20 Q. And you never had any questions at all about his integrity  
21 about anything, did you?

22 A. I did not.

23 Q. You never had any questions about -- that he was going to,  
24 just like you, be careful to follow the law -- withdrawn.

25 You never had any questions at all about his -- that

H3kdwal3

Engles - cross

1 he was following the law, correct?

2 A. I did not.

3 Q. OK. And am I right, sir, you testified that you had such  
4 high regard for him, am I right, that when the spin-off was  
5 going to happen, you thought he would be the best person to be  
6 the new chairman of the board of Dean Foods, correct?

7 A. Yes. It was because of Mr. Davis' particular experience  
8 and skill set.

9 Q. And Gregg Tanner was going to be the new CEO of Dean Foods  
10 when you went on to be the CEO of WhiteWave, correct?

11 A. That's correct.

12 Q. And you thought, based on how impressed you were with  
13 Mr. Davis and his skill set and how valuable his experience and  
14 understanding of finance was, that he would be the perfect  
15 chairman when Mr. Tanner was CEO; fair statement?

16 A. Those would not be my words exactly. My words would be  
17 that Mr. Tanner had almost no experience with the financial  
18 markets, which is an important aspect of being a public company  
19 CEO, and Mr. Davis did have a lot of experience in those  
20 matters, and so their combined experiences would make them a  
21 good team as the board and executive leadership of Dean Foods.

22 Q. Yes. And after the spin-off, this was also an important  
23 time for Dean Foods because they had to establish themselves  
24 without WhiteWave, correct?

25 A. Well, they were the established company, Dean was, but any

H3kdwal3

Engles - cross

1 time you go through a management transition it is important  
2 that you have the right leadership at the top.

3 Q. And it was based on your high regard of Mr. Davis that you  
4 thought he would be a good leader for that --

5 A. Yes, I thought he would be a good leader on the board.

6 Q. And, sir, am I right, you knew Mr. Davis pretty well,  
7 right?

8 A. Pretty well, yes.

9 Q. You knew he liked to gamble a lot in Las Vegas, correct?

10 A. I knew he liked to go to Las Vegas, yes.

11 Q. You knew that he had a high risk appetite when he was  
12 gambling, correct?

13 A. Yes, I did.

14 Q. I think you at one point saw him lose \$150,000 sitting  
15 playing blackjack, correct?

16 A. Yes, I did.

17 Q. And none of that caused you to have a different view of his  
18 honesty, integrity, or anything else, did it?

19 A. He was an honest gambler.

20 Q. And you understood, sir, that he -- at some point when his  
21 investment bank DLJ was sold, he got a very substantial payout,  
22 correct?

23 A. Yes. My belief was Tom was quite wealthy.

24 Q. And you knew that he -- well, and at some point you  
25 understood he went through a costly divorce with his then wife

H3kdwal3

Engles - cross

1 Louise?

2 A. Yes. I was well aware that he was divorced from Louise.

3 Q. And you knew some investments he was involved in, like Park  
4 Cities, did not turn out to be good investments for him,  
5 correct?

6 A. I don't know what you are referring to with respect to Park  
7 Cities.

8 Q. Well, let me ask you this. You knew he was involved in  
9 some businesses with Bucky Lyons, correct?

10 A. Yes.

11 Q. And they were often not successful, correct?

12 A. I knew they had some challenges, yes.

13 Q. And there is nothing about his finances that caused you to  
14 change your views about Mr. Davis in any way, was there?

15 A. Nothing that I was aware of, no.

16 Q. And in fact, sir, am I right that until whenever you  
17 learned about Mr. Davis in connection with this case, there was  
18 nothing that you learned or saw in your 20-plus years of  
19 dealing with Mr. Davis that caused you in any way to question  
20 his integrity, his honesty, or his law-abidingness, was there,  
21 sir?

22 A. No.

23 MR. BERKE: Thank you, your Honor.

24 THE COURT: All right. You may cross-examine --  
25 redirect, rather.

H3kdwal3

Engles - redirect

1 MR. GOLDMAN: Thank you, your Honor. I will try to  
2 keep it brief, and if we might go a couple of minutes past 1, I  
3 think I should be finished.

4 REDIRECT EXAMINATION

5 BY MR. GOLDMAN:

6 Q. Good afternoon, Mr. Engles.

7 A. Hello, Mr. Goldman.

8 Q. You were asked a number of questions on Thursday on  
9 cross-examination about some of the input costs of the raw  
10 materials that are needed to run Dean Foods. Do you remember  
11 that?

12 A. Yes, I do.

13 Q. And defense counsel went through a number of factors that  
14 affected Dean Foods' performance; do you remember that?

15 A. Yes, I do.

16 Q. You were asked about milk prices, right?

17 A. Yes.

18 Q. You Were asked about the futures market for milk prices?

19 A. Yes.

20 Q. The price of resin?

21 A. Yes.

22 Q. The price of diesel fuel?

23 A. Yes.

24 Q. The global supply and demand for milk?

25 A. Yes.

H3kdwal3

Engles - redirect

1 Q. Currency fluctuations?

2 A. Yes.

3 Q. And there was more, right?

4 A. Yes.

5 Q. And all of that information that you were asked about of  
6 those factors was available to the public, is that right?

7 A. A lot of it is, certainly.

8 Q. And those people who follow the markets were able to follow  
9 the fluctuations in those types of prices and those factors,  
10 right?

11 A. Yes.

12 Q. Were conversations that took place in board meetings  
13 available to the public?

14 A. No.

15 Q. Were conversations between you and Tom Davis about  
16 significant nonpublic matters related to Dean Foods available  
17 to the public?

18 A. No.

19 Q. And when you spoke to investors, did you or anyone from the  
20 company give a preview of what the future earnings  
21 announcements would be for the company?

22 A. No.

23 Q. Why not?

24 A. Because it was often unknown and always material.

25 Q. And but at earnings calls and other conferences, you I

H3kdwal3

Engles - redirect

1 believe testified that you would share your long-term outlook  
2 on some of those factors with the public, is that right?

3 A. Yes.

4 Q. But you didn't set the prices or the costs of all of those  
5 factors, did you?

6 A. No.

7 Q. And it was perfectly appropriate for you to share with the  
8 public your or the company's long-term outlook, is that right?

9 A. Yes. We were trying to help the market understand as well  
10 as possible the forces that we felt would affect our  
11 performance and, therefore, their investment decision.

12 Q. Sometimes when you had the smaller meetings with investors  
13 that you described, would you discuss your long-term outlook on  
14 those factors?

15 A. Yes.

16 Q. And that was appropriate, in your mind, right?

17 A. Yes.

18 Q. Did you ever discuss any of those factors with Billy  
19 Walters?

20 A. No.

21 Q. To your knowledge, had anyone else in the management of  
22 Dean Foods ever discussed those factors with Billy Walters?

23 A. No.

24 Q. And you were a member of the board in addition to being  
25 CEO, is that right?



H3kdwal3

Engles - redirect

1 A. Yes, I was.

2 Q. And you testified that the board was apprised of meetings  
3 with investors, right?

4 A. Yes.

5 Q. In fact, Mr. Berke showed a number of slides about meetings  
6 with investors, is that right?

7 A. Yes.

8 Q. And none of those meetings were improper in any way, right?

9 A. No.

10 Q. And did you ever share material nonpublic meetings (sic)  
11 with investors in any of those meetings?

12 A. Would you rephrase, please?

13 Q. Sure. Do you recall ever sharing material nonpublic  
14 information with any of those investors in the small meetings  
15 that you had?

16 A. No.

17 Q. Was the board ever apprised of any meetings with Billy  
18 Walters?

19 A. No.

20 Q. Now, you were shown also lists of the top investors in Dean  
21 Foods a couple of times. Do you remember those?

22 A. Yes.

23 Q. At various points in time?

24 A. Yes.

25 Q. Those were institutional investors, is that right?

H3kdwal3

Engles - redirect

1 A. Yes.

2 Q. And how did Dean Foods determine who the top institutional  
3 investors were?

4 A. They have to file forms at the end of each quarter during  
5 the year disclosing which securities they own and in what  
6 amounts.

7 Q. So, does Dean Foods then look at those filings to determine  
8 the top investors?

9 A. Yes.

10 Q. Did you see Billy Walters' name in any of those top  
11 investors?

12 A. I did not.

13 Q. Did you see The Walters Group included in any of those top  
14 investors?

15 A. I did not.

16 Q. Did you see the Nature Development included in any of those  
17 slides?

18 A. Not that I recall.

19 MR. GOLDMAN: I don't know, Ms. Meister, if we can  
20 pull Defense Exhibit 1040, page 36, which is admitted. It is  
21 1040B, I believe. And I think you --

22 MR. BERKE: 1040-A, page 36.

23 MR. GOLDMAN: Sorry. OK.

24 Q. This is a list of the top 15 institutional investors in  
25 Dean Foods, is that right?

H3kdwal3

Engles - redirect

1 A. Yes, it is, as of various dates.

2 Q. As of various dates, thank you.

3 So as of September 30, 2012, is that right?

4 A. Yes.

5 Q. OK. And did you or the board have any idea that as of  
6 September 30, 2012, Billy Walters owned 5 million shares of  
7 Dean Foods' stock?

8 A. No.

9 Q. So that would made him the seventh largest investor in Dean  
10 Foods at this time?

11 A. Yes.

12 MR. GOLDMAN: You can take that down. Thank you.

13 Q. You were also asked some questions about Appaloosa and  
14 David Tepper. Do you remember that?

15 A. Yes, I do.

16 Q. In fact, I think you were asked about a significant  
17 investment by Appaloosa in early 2011, is that right?

18 A. Yes.

19 MR. GOLDMAN: And if we could show Defense Exhibit  
20 1124 and blow that up.

21 Q. And this was an email between you and Tom Davis, an email  
22 exchange, rather, between you and Tom Davis, is that right?

23 A. Yes, it is.

24 Q. Do you see that?

25 And then the original email from Tom Davis to you, can

H3kdwal3

Engles - redirect

1 you read the date and time of that email?

2 A. January 1st -- I'm sorry, January 7th, 2011, at 7:13 p.m.

3 Q. And Mr. Davis writes to you: "Did you know anything about  
4 Appaloosa before today? Interesting investment."

5 Do you see that?

6 A. Yes.

7 Q. Was it your understanding that Appaloosa had filed that  
8 form 13-F on January 7th?

9 A. Yes.

10 Q. And do you know if Billy Walters invested in Dean Foods in  
11 early 2011?

12 A. I do not know.

13 Q. And you were asked questions on cross-examination about how  
14 the stock price went up from January through May of 2011, is  
15 that right?

16 A. Yes.

17 Q. And Mr. Berke was asking you questions about how that  
18 related to Appaloosa's investment; do you recall those  
19 questions?

20 A. I don't recall that specific question, no.

21 Q. OK. Well, do you have any idea whether Billy Walters  
22 bought or sold Dean Foods stock on January 7, 2011?

23 A. I have no idea.

24 Q. Now, the email, as you testified to on cross-examination,  
25 referenced several conversations. Do you remember your email

H3kdwal3

Engles - redirect

1 to Tom Davis?

2 A. I see that here, yes.

3 Q. You see that. And I believe that you testified that you  
4 had one conversation with Appaloosa; is that right?

5 A. Yes. My recollection is that our investor relations team  
6 had received inquiries about the company from Appaloosa. Those  
7 were the conversations that are referred to here as "We had  
8 several conversations." I had one meeting with a  
9 representative of Appaloosa which followed these events. It  
10 was later.

11 Q. It was later.

12 And do you recall -- I believe you may have testified  
13 about this on cross, but do you recall whether you discussed  
14 the possibility of a spin-off of WhiteWave at that meeting?

15 A. I don't recall with certainty, no.

16 (Continued on next page)

H3K3WAL4

Engles - redirect

1 Q. Do you recall whether you told Appaloosa anything about the  
2 spinoff of WhiteWave that you had not told the public?

3 A. I am quite sure we did not. My general counsel was sitting  
4 in the room of the meeting I did have, my head of investor  
5 relations. Had we done so, we would have filed an 8-K.

6 Q. When you had these one-on-one meetings or these small  
7 meetings, did you provide any more information to the investors  
8 than you had already provided to the public?

9 A. Not in general. We may have answered questions with more  
10 specificity about what was happening with the price of a given  
11 input or those sorts of things, but in terms of topics and  
12 conclusions, no.

13 Q. If there was something that you deemed to be material to  
14 the company, would you provide these investors at these small  
15 meetings with any information about that that was not already  
16 public?

17 A. No.

18 Q. You also have testified a little bit on cross-examination  
19 about analysts and what their role was. Do you recall that?

20 A. Yes, I do.

21 Q. I believe that you testified that analysts tried to predict  
22 the performance of Dean Foods based on a variety of those  
23 factors that we just spoke about. Do you recall that?

24 A. Yes.

25 Q. Did analysts use their own models to make those sorts of

H3K3WAL4

Engles - redirect

1 predictions?

2 A. Yes.

3 Q. Did different analysts say different things about Dean  
4 Foods?

5 A. Absolutely.

6 Q. Sometimes did analysts directly contradict each other?

7 A. Of course.

8 Q. Were there other factors that were not available to the  
9 public that would affect the company's quarterly performance?

10 A. Yes.

11 Q. Were analysts able to incorporate those factors into their  
12 analysis?

13 MR. BERKE: Objection, your Honor. Foundation.

14 THE COURT: Sustained.

15 Q. Mr. Engles, were analysts able to perfectly predict the  
16 performance of Dean Foods?

17 A. No.

18 Q. Why not?

19 A. Because no one can consistently predict the future.

20 Q. Did analysts have any information that was not available to  
21 the public when they made their predictions?

22 MR. BERKE: Objection, your Honor.

23 THE COURT: Rephrase that, please.

24 Q. Did you or anyone from the company provide information to  
25 the analysts that was not already public when they made their

H3K3WAL4

Engles - redirect

1 predictions?

2 A. No.

3 MR. GOLDMAN: I just have a couple more topics to  
4 touch upon.

5 THE COURT: Well --

6 MR. GOLDMAN: If I beg your indulgence.

7 THE COURT: It's not my indulgence. It is my jury's  
8 indulgence.

9 Give me a time estimate.

10 MR. GOLDMAN: Five minutes, your Honor.

11 THE COURT: Then we'll come back five minutes later  
12 after the lunch break. All right, ladies and gentlemen.

13 Go ahead, Mr. Goldman.

14 MR. GOLDMAN: Thank you, I appreciate that.

15 Q. Do you recall being asked questions about a Reuters news  
16 story that related to Morningstar?

17 A. Yes.

18 Q. I think it was the end of your cross-examination this  
19 morning. Did you know how Reuters got that information?

20 A. No.

21 Q. But is it fair to say it was somehow leaked to a reporter?

22 A. Someone disclosed it to the reporter, yes.

23 Q. Was that a concern for you and the company?

24 A. Yes.

25 Q. Why is that?



H3K3WAL4

Engles - redirect

1 A. Because it was not information that we had disclosed to the  
2 public. And sometimes these disclosures contain inaccuracies.

3 Q. Was this something that was material to the company, the  
4 sale of Morningstar?

5 A. Yes, it was.

6 Q. If I can quickly show Defense Exhibit 663. This was the  
7 e-mail that was admitted into evidence between you and Tom  
8 Davis at the top where you say "I totally agree, Tom, been  
9 hearing lots of chatter." Do you see where you say that?

10 A. Yes.

11 Q. Did you hear any similar types of chatter about the  
12 WhiteWave spinoff before it was announced on August 7, 2012?

13 A. Not that I recall.

14 Q. After learning about this Reuters story that was going to  
15 run, what did the company do?

16 A. The company put out a press release regarding our  
17 considerations about selling Morningstar, so that the public  
18 had good and accurate information regarding the disclosures  
19 that had been made in the Reuters article.

20 Q. Was that press release issued earlier than you would have  
21 otherwise publicly released that information?

22 A. Yes.

23 Q. Is this generally how Dean Foods handled material  
24 information that reached the public in unauthorized ways?

25 A. That's my recollection, yes.

H3K3WAL4

Engles - redirect

1 Q. Mr. Engles, prior to the WhiteWave spinoff announcement on  
2 August 7, did you issue a press release earlier than planned?

3 A. No.

4 Q. Unlike with Morningstar, prior to August 7, did you have  
5 any reason to believe that you needed to issue a public  
6 statement because of chatter in the marketplace?

7 A. No.

8 Q. You were asked extensively, and I'm going to be brief about  
9 this, but you were asked extensively about the chronology of  
10 your public comments about the possibility of a WhiteWave  
11 spinoff. Do you remember the general topic?

12 A. Yes, I do.

13 Q. You gave public statements about the the WhiteWave spinoff  
14 at various points, right?

15 A. Yes, I did.

16 Q. In 2010, for example, you addressed the possibility of a  
17 WhiteWave spinoff to the public at the Barclays Back to School,  
18 is that right?

19 A. Yes, I did.

20 Q. You were asked questions at the next earnings call as well?

21 A. Yes.

22 Q. At that point, were there other considerations of strategic  
23 alternatives for Dean Foods with respect to resolving its debt  
24 issues?

25 A. Yes.

H3K3WAL4

Engles - redirect

1 Q. Just briefly, if you could remind the jury what those were.

2 A. Well, the principal consideration was the possible sale of  
3 WhiteWave, and using the proceeds to pay down the debt.

4 Q. Were you also considering selling other assets of the  
5 company as well?

6 A. Yes, we did sell some other assets.

7 Q. You also made statements at the CAGNY conference in 2011,  
8 is that right?

9 A. Yes, I did.

10 Q. Those were public statements, is that right?

11 A. Yes, they were.

12 Q. Did you tell the public that once everything was resolved,  
13 Dean Foods would in fact pursue a spinoff of WhiteWave?

14 A. No.

15 Q. You talked about this concept of unlocking shareholder  
16 value which you also discussed at that conference, is that  
17 right?

18 A. Yes.

19 Q. Explain the various possibilities for unlocking shareholder  
20 value with the WhiteWave subsidiary.

21 A. Well, there were really two. One was the spinoff, which is  
22 the path we ultimately pursued. But we also constantly  
23 highlighted Morning -- or WhiteWave and its value and its  
24 performance, like in the Jim Cramer episode. And we could have  
25 also unlocked the value by the market simply recognizing the

H3K3WAL4

Engles - redirect

1 value of WhiteWave and bidding Dean Foods' stock price up  
2 directly.

3 Q. If that had happened, would you have needed -- would you  
4 have gone forward with a spinoff?

5 A. I don't know.

6 Q. But would it have been possible that you would not have?

7 A. Entirely possible.

8 Q. If I could briefly go to Government Exhibit 460. I'm  
9 sorry. Well, we can leave that up.

10 This was the May 8 board meeting minutes. Do you  
11 recall that meeting on May 8?

12 A. I do.

13 Q. What authority, if any, did the board give you to  
14 aggressively pursue a spinoff at that meeting?

15 A. They gave us the authority to keep working, keep doing the  
16 analysis, keep doing the work necessary to determine if it was  
17 feasible.

18 Q. Was that similar to what the board resolved at the next  
19 meeting that you looked at on May 17?

20 A. Yes, virtually identical.

21 MR. GOLDMAN: If we could briefly bring up Government  
22 Exhibit 605-A. Go to page seven. This is the earnings call  
23 transcript from May 9, 2012. Yes the top paragraph, please.

24 Q. I believe Mr. Berke read that entire first sentence except  
25 for the last phrase. So could you read the whole sentence

H3K3WAL4

Engles - redirect

1 again including the last phrase.

2 A. Of the top paragraph?

3 Q. Yes.

4 A. We expect -- is that the one?

5 Q. No. "Despite the slight growth."

6 A. Oh. "Despite the slight growth in debt, with a strong  
7 growth in EBITDA, our leverage ratio of funded debt to EBITDA  
8 as defined by our credit agreements continued to decline  
9 reaching 4.41 times at quarter end."

10 Q. So at this point, May 9, 2012, what did you tell the market  
11 that your debt ratio was?

12 A. 4.41 times.

13 Q. You had on cross-examination explained that you needed the  
14 debt to get down to four times in order to consider a spinoff,  
15 is that right?

16 A. Yes.

17 Q. In this conference call transcript, when did you tell the  
18 public that you expected the leverage to be down to four times?

19 A. By year end 2012.

20 Q. At any point in your public conversations or communications  
21 about the possibility of a WhiteWave spinoff, did you tell the  
22 public that Dean Foods intended to do an IPO of WhiteWave as  
23 part of that spinoff process?

24 A. No. Not that I recall.

25 Q. What effect did the IPO have on the company's debt ratio?

H3K3WAL4

Engles - redirect

1 A. It lowered it by raising cash.

2 Q. Did that allow you to do the spinoff earlier than you would  
3 have otherwise done a straight spinoff?

4 A. Yes.

5 Q. Was that known to the public?

6 A. No, it was not.

7 Q. Mr. Engles, did you ever tell the public at any point that  
8 the company was aggressively pursuing a spinoff?

9 A. Not that I recall.

10 Q. Did you ever indicate to the public at any point when the  
11 company would file the S-1 registration statement and announce  
12 the spinoff?

13 A. Not that I recall.

14 MR. GOLDMAN: Last topic, your Honor.

15 Q. You were shown on a -- we'll pull it up, Government Exhibit  
16 702-L, which is a press release June 25, 2008. Do you recall  
17 this?

18 A. Yes.

19 Q. Mr. Berke asked you if this was your best guess, quote  
20 unquote, of earnings at that time. Do you recall that?

21 A. Yes.

22 Q. What date is this press release?

23 A. June 25, 2008.

24 Q. When did the quarter end?

25 A. June 30, 2008.

H3K3WAL4

Engles - redirect

1 Q. At the time that you released this press release, what did  
2 you already know about the second quarter earnings performance?

3 A. We knew what April's results were and May's results, and we  
4 had some sense of what sales were for June.

5 Q. So did you have a pretty good sense of what second quarter  
6 earnings were?

7 A. Well, we had a pretty good sense of what they would be at  
8 least. At least 32 cents.

9 Q. This pre-announcement of the second quarter earnings  
10 guidance, was this forecast to the public that it would be  
11 announced on this date?

12 A. No.

13 Q. Was it released without any warning to the market or the  
14 public?

15 A. Yes.

16 MR. GOLDMAN: If we can go to Government Exhibit 1907,  
17 finally, please. If we can highlight the top third, please.

18 Q. You were asked whether you would have typically discussed  
19 that earnings guidance at a board meeting later in the summer,  
20 the following board meeting, do you recall that?

21 A. Yes.

22 Q. Well, what is the date of this e-mail, Government Exhibit  
23 1907?

24 A. June 11, 2008.

25 Q. Then if you could just read the second line where it says

H3K3WAL4

Engles - redirect

1 "by the way."

2 A. "By the way, we are having a great quarter. Already at 25  
3 cents through two months and guided to 26 to 31 cents."

4 Q. Anyone who would understand earnings knows if you're  
5 already at 25 cents through two months, how would that finish  
6 or how would that trajectory project through the end of the  
7 quarter?

8 MR. BERKE: Objection, your Honor.

9 THE COURT: Sustained.

10 Q. Mr. Engles, when you understood that you were at 25 cents  
11 through two quarters, how did you project that earnings would  
12 be for the second quarter?

13 MR. BERKE: Objection, your Honor.

14 THE COURT: I'll allow that.

15 A. Well, we certainly thought they would be better than 25  
16 cents, and we expected they would be good. I would say at or  
17 above the top end of this range.

18 Q. By June 25 -- in fact, as of this date of June 11, 2008,  
19 you had already told Tom Davis about the first two quarters of  
20 the second quarter, right?

21 A. The first two months of the second quarter.

22 MR. GOLDMAN: No further questions.

23 MR. BERKE: Can I ask one question?

24 THE COURT: Sure.

25 RECROSS EXAMINATION



H3K3WAL4

1 BY MR. BERKE:

2 Q. Sir, when we looked at the list of institutional investors  
3 that were on the screen, private investors don't have the same  
4 obligations to disclose the stocks they're investing in, do  
5 they?

6 A. No, they do not.

7 MR. BERKE: Thank you, your Honor.

8 THE COURT: You may step down, sir. Thank you.

9 (Witness excused)

10 THE COURT: Ladies and gentlemen, it's 1:15 so we'll  
11 pick up at 2:15. And thank you for accommodating the schedule  
12 here to allow Mr. Engles to complete his testimony. We'll pick  
13 up with the next witness who will be in the witness box at the  
14 time we resume, and that will be at 2:15.

15 Thank you all, ladies and gentlemen. Do not discuss  
16 the case among yourselves or with anyone. Thank you.

17 (Jury excused)

18 THE COURT: Who is next?

19 MR. GOLDMAN: Thomas Carocci.

20 THE COURT: Thank you.

21 MR. GOLDMAN: Thank you, your Honor.

22 (Recess)

23 (Continued on next page)

H3K3WAL4

1 AFTERNOON SESSION

2 2:15 p.m.

3 (In open court; jury present)

4 THE COURT: Good afternoon, ladies and gentlemen.  
5 We're back in action. You may call your next witness,  
6 Ms. Cucinella.

7 MS. CUCINELLA: Your Honor, before the government  
8 calls its next witness, we'd like to read a stipulation.

9 THE COURT: Please be seated, sir.

10 Is it testimonial or a factual stipulation?

11 MS. CUCINELLA: It is testimonial.

12 THE COURT: All right. A testimonial stipulation is  
13 an agreement by the parties that if a witness were called to  
14 testify, the witness would testify in the following manner.  
15 You must accept that stipulation, that agreement between the  
16 the two sides as to what this witness -- not the witness who is  
17 in the witness box, this other witness would testify. The  
18 weight, if any, to be given to the testimony of that witness  
19 is, however, a matter for you, the members of the jury, to  
20 decide.

21 With that, please proceed.

22 MS. CUCINELLA: Thank you, your Honor.

23 It is hereby stipulated and agreed by and among the  
24 United States of America, by Joon H. Kim, acting United States  
25 attorney for the Southern District of New York, Daniel S.

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1 Goldman, Brooke Elizabeth Cucinella, and Michael Ferrara,  
2 assistant United States attorneys, and William T. Walters, the  
3 defendant, with the consent of his attorneys Barry H. Berke and  
4 Paul H. Schoeman that:

5 1. If called to testify, a representative of Dean  
6 Foods Company ("Dean Foods") would testify to the following:

7 a. All documents with Bates numbers beginning with  
8 Dean Foods, Dean Foods-E, DF-CV, DF-SEC-E, or Dean Foods-ER  
9 were maintained in Dean Foods' files.

10 b. Government Exhibits 400 through 421, 421-A, 422,  
11 423, 423-A, 424 through 427, 427-A, 428 through 437, 437-A  
12 through 437-E, 438, 439, 439-A, 439-B, 440 through 442, 442-A  
13 and 444 through 479 accurately memorialize the minutes of the  
14 Dean Foods board of directors meetings to which they relate.

15 c. Government Exhibits 700-A, 700-B, 701-A through  
16 701-G, 702-A through 702-U, 703-A through 703-W, 704-A through  
17 704-Z, 704-AA, 705-A through 705-Z, 706-A through 706-T, 707-A  
18 through 707-Z, and 707-AA through 707-II are true and correct  
19 copies of Dean Foods press releases.

20 d. Government Exhibits 800 through 888, 888-A and 889  
21 through 914 are true and correct copies of Dean Foods filings  
22 with the U.S. Securities and Exchange Commission.

23 2. If called to testify, a representative of  
24 McGraw-Hill Financial would testify that Government Exhibits  
25 600-A, 601-A through 601-D, 602-A through 602-D, 603-A through

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1 603-D, 604-A through 604-D, 605-A through 605-D, 605-A through  
2 605-D, and 606-A through 606-D are true and correct transcripts  
3 of Dean Foods earnings calls.

4 3. If called to testify, a representative of Thomson  
5 Reuters would testify to the following:

6 a. Government Exhibit 505 is a true and correct  
7 transcript of a February 22, 2011 CAGNY conference in which  
8 Dean Foods participated.

9 b. Government Exhibit 513 is a true and correct  
10 transcript of a September 7, 2010, Barclays Back-to-School  
11 consumer conference in which Dean Foods participated.

12 c. Government Exhibit 54 is a true and correct  
13 transcript of a May 30, 2012 Sanford C. Bernstein & Company  
14 Strategic Decisions Conference in which Dean Foods  
15 participated.

16 4. If called to testify, a representative of  
17 Barington Capital would testify that all documents with Bates  
18 numbers beginning BC were maintained in Barington Capital's  
19 files.

20 5. If called to testify, a representative of The  
21 Walters Group would testify that all documents with Bates  
22 numbers beginning WG or WG-GJ were maintained in The Walters  
23 Groups' files.

24 6. If called to testify, a representative of  
25 Bloomberg LP would testify that Government Exhibit 1739

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1 accurately reflects daily price and volume data for Dean Foods  
2 stock.

3 By this stipulation, each party waives its rights to  
4 contest the authenticity of the documents and government  
5 exhibits subject to the stipulation under Federal Rule of  
6 Evidence 901, but neither party waives its right, with respect  
7 to any of the documents or government exhibits subject to this  
8 stipulation, to contest admissibility on grounds of relevance,  
9 hearsay, or under Federal Rule of Evidence 403.

10 The parties have further agreed that this stipulation,  
11 which has been marked as Government Exhibit 2100, may be  
12 received in evidence.

13 Dated New York, New York, March 16, 2017, and signed  
14 by the parties.

15 Your Honor, at this time, the government would offer  
16 both Government Exhibit 2100 and a series of press releases  
17 covered by the stipulation, which include Government Exhibit  
18 702-C, 702-G, 702-N, 702-Q, 704-C, 704-H, 704-O, 704-W, 706-F,  
19 706-L, 706-Q, and 707-D.

20 MR. SCHOEMAN: No objection.

21 THE COURT: Received. Thank you.

22 (Government's Exhibit 2100, 702-C, 702-G, 702-N, 702-Q  
23 received in evidence)

24 (Government's Exhibit 704-C, 704-H, 704-O, 704-W,  
25 706-F received in evidence)

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Carocci - direct

1 (Government's Exhibit 706-L, 706-Q, 707-D received in  
2 evidence)

3 MR. GOLDMAN: At this time the government calls Thomas  
4 Carocci.

5 (Witness sworn)

6 THOMAS CAROCCI,

7 called as a witness by the Government,

8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. GOLDMAN:

11 Q. Good afternoon, Mr. Carocci.

12 A. Good afternoon.

13 Q. What is your educational background?

14 A. I have a law degree from Duquesne University in Pittsburgh,  
15 Pennsylvania, and undergraduate degrees in finance and  
16 economics.

17 Q. Where do you currently work?

18 A. I work for FINRA, that's F-I-N-R-A. And it's the Financial  
19 Industry Regulatory Authority.

20 Q. What is FINRA?

21 A. FINRA is what's called a private self-regulatory  
22 organization. So we regulate the securities industry.

23 Q. Is it a governmental organization?

24 A. No. We're actually funded by the member firms that we  
25 regulate, and we're private.

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Carocci - direct

1 Q. What oversight role does FINRA play on the stock markets?

2 A. What our mission statement is investor protection and  
3 market integrity. Our goal is to protect investors and to  
4 ensure, you know, market integrity. That there is fair  
5 trading.

6 Q. How long have you worked at FINRA?

7 A. For approximately 18 years.

8 Q. What is your current position?

9 A. I'm the senior counsel with the criminal prosecution  
10 assistance group.

11 Q. What is the criminal prosecution assistance group?

12 A. It's a group within FINRA that assists federal, state and  
13 local prosecutors with their white collar criminal  
14 investigations and trials.

15 Q. What are your duties and responsibilities as a part of this  
16 group?

17 A. To assist investigators with analysis of data, to testify  
18 before grand juries or jury trials such as this.

19 Q. How do you get assigned cases or investigations?

20 A. Usually prosecutors or investigators will contact us,  
21 seeking assistance. And if we can do it, we usually -- and  
22 have some expertise to burn, we usually assist.

23 Q. Have you had any training as part of your current position?

24 A. Yes. At FINRA, I completed what's called our examiner  
25 university, and that's just a program where you get an in-depth

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Carocci - direct

1 education on brokerage firms' books and record, what they're  
2 required to maintain and how they operate. I also completed  
3 the FINRA Institute at the Wharton School of Business, which is  
4 for a certified regulatory compliance professional. It's a  
5 year-long program that you attend different weeks during the  
6 year. So, and then I also just attend conferences and seminars  
7 that are continuing education.

8 Q. How long have you worked in the criminal prosecution  
9 assistance group?

10 A. For approximately 14 out of the 18 years I've been with  
11 FINRA.

12 Q. What have you done in those other four years?

13 A. I started in FINRA -- they had what's called a corporate  
14 finance department. And this department reviews initial public  
15 offerings of stock and the terms that brokerage firms that  
16 underwrite the offerings take companies public with. I did  
17 that for a little over two years I believe.

18 Q. And the other?

19 A. And I also worked in the FINRA member regulation  
20 department. This department conducts examinations of the  
21 member firms, it goes on site and looks at their books and  
22 records, their procedures, their operations, to ensure that  
23 they're following the FINRA rulebook and federal securities  
24 laws and regulations.

25 Q. Is there a group within FINRA that flags suspicious trading



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Carocci - direct

1 in the stock markets?

2 A. Yes. Yes. We have a market regulation department  
3 within -- there is an office or, I'm sorry, there is the office  
4 of fraud detection and market intelligence.

5 Q. Have you ever worked in that group?

6 A. I have not, no.

7 Q. What is the relationship between the criminal prosecution  
8 assistance group and the market regulation group?

9 A. Well, we're -- as part of the criminal prosecution  
10 assistance group, I'm walled off from all what would be FINRA  
11 regulatory investigations or civil investigations. Because I  
12 only assist in criminal matters, and when FINRA brings  
13 regulatory actions, that's exactly what they are. They're  
14 non-criminal.

15 Q. Have you had any involvement in the investigation of Billy  
16 Walters?

17 A. No.

18 Q. Have you been asked to review trading records and other  
19 materials in connection with Billy Walters' trading in Dean  
20 Foods?

21 A. Yes, I have.

22 Q. You mentioned that FINRA oversees the stock markets. Does  
23 that include the New York Stock Exchange?

24 A. Yes. Trading on the NASDAQ and New York Stock Exchange by  
25 member firms.

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Carocci - direct

1 Q. What is the NASDAQ?

2 A. Right. The NASDAQ is a stock exchange where stocks are  
3 traded, bought and sold. They're listed for trading and bought  
4 and sold on the exchange.

5 Q. Is that another exchange similar to the New York Stock  
6 Exchange?

7 A. It is similar to the New York Stock Exchange.

8 Q. Are there requirements to be listed on the New York Stock  
9 Exchange?

10 A. Yes.

11 Q. What are those?

12 A. Generally you have to be larger companies, as far as having  
13 at least 400 shareholders, a \$4 stock price, and generally a  
14 market capitalization, which would be your share price times  
15 your number of outstanding shares. So one way to judge the  
16 size of a company. That would need to be over \$40 million.

17 Q. Are you familiar with the S&P 500?

18 A. Yes, I am.

19 Q. What is that?

20 A. It's kind of a group of 500 companies that are the largest  
21 500 publicly traded companies listed on the exchanges.

22 Q. Is Dean Foods listed on the New York Stock Exchange?

23 A. It was, yes.

24 Q. Well, is Dean Foods on the New York Stock Exchange?

25 A. I'm sorry, yes. Yes, I'm sorry.

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Carocci - direct

1 Q. Is it listed as part of the S&P 500?

2 A. It was. I'm sorry, it was, yes.

3 Q. It was until when, do you know?

4 A. Until I believe May 23, 2013.

5 Q. Do you know what happened on that date?

6 A. I believe when they divested WhiteWave, they no longer  
7 qualified as one of the largest 500 companies because those  
8 assets were removed from Dean Foods.

9 Q. As part of your duties and responsibilities, are you  
10 familiar with the required SEC filings of public companies?

11 A. Yes.

12 Q. You stated that in order to be listed on the New York Stock  
13 Exchange, you must file regular reports with the SEC?

14 A. Correct. To be listed and remain listed on the New York  
15 Stock Exchange, you need to be current in your SEC filings.

16 Q. What filings must you be current with?

17 A. Well, your 10-K, which is your annual report, which would  
18 have audited financial statements in it. So companies are  
19 required to file that with the SEC on an annual basis. And the  
20 SEC then puts it on their website so that the investing public  
21 can look at it and review it.

22 Q. What other reports must be filed?

23 A. There's 10-Qs, which are quarterly reports, that companies  
24 listed on the New York Stock Exchange such as Dean Foods would  
25 file on a quarterly basis that gives an update of the previous

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Carocci - direct

1 90 days and what's going on with the company and some  
2 financials. They would file three of those a year. And then  
3 the annual report.

4 Q. Are you familiar with an SEC form 8-K?

5 A. Yes.

6 Q. What is that?

7 A. That's a current report. And if a company has kind of  
8 material information, some information that might be material  
9 or important to investors and they want to disclose it to the  
10 public, they can file an 8-K report with the Securities and  
11 Exchange Commission. And the Securities and Exchange  
12 Commission, again, will put that on their website for the  
13 investing public or anybody to see.

14 Q. Are you also familiar with an SEC regulation called  
15 Regulation F.D.?

16 A. Yes.

17 Q. What does that stand for?

18 A. Fair Disclosure.

19 Q. When was that regulation issued?

20 A. In 2000.

21 Q. What does it say?

22 A. Well --

23 MR. SCHOEMAN: Objection, your Honor.

24 THE COURT: No, I'll allow it. Go ahead.

25 A. It prohibits companies from selectively disclosing

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Carocci - direct

1 non-public, material information.

2 Q. What do you mean by selectively?

3 A. Well, they can't selectively disclose it to an individual  
4 or investor or shareholder. It must be widely disseminated.  
5 Widely distributed.

6 Q. If a company violates the Regulation F.D. rule, what must  
7 they do?

8 A. They must promptly make a wider distribution of this  
9 information, for example, if they inadvertently disclosed it to  
10 a select group of people.

11 Q. Are these SEC requirements of public companies that you  
12 just mentioned generally available to the investing public?

13 A. Yes, they are.

14 Q. Where?

15 A. On the SEC's website, there's what's called an EDGAR  
16 database. The filings would be on there.

17 Q. Mr. Carocci, can you briefly explain how shares are  
18 actually traded on a stock exchange like the New York Stock  
19 Exchange.

20 A. Yes. There are brokerage firms that execute buy and sell  
21 transactions on behalf of clients who have accounts with their  
22 firm.

23 Q. What is a brokerage firm?

24 A. Right. So that would be a firm, it would be a FINRA  
25 member, actually, firm, that again, has the ability to

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Carocci - direct

1 execute -- is registered with FINRA and with the SEC, and has  
2 the ability to buy and sell stock for the investing public on  
3 behalf of the investing public, and charge money to do that.

4 Q. Can you give some examples for the jury.

5 A. Sure. A Goldman Sachs, a E\*Trade, you know, a JPMorgan.

6 Q. What is the name of somebody who actually executes the  
7 trades on behalf of the brokerage firm?

8 A. That would be a broker at the firm can look and see what  
9 the stock is being offered to buy at and what it's being  
10 offered to sell at.

11 Q. Must brokers be registered as well?

12 A. Brokers are also required to be registered with FINRA, and  
13 they're also required to pass an examination testing their  
14 knowledge of security industry products, rules, regulations,  
15 and federal securities laws in order to serve the investing  
16 public in that way.

17 Q. Are you familiar with a concept called margin trading?

18 A. Yes.

19 Q. What is that?

20 A. A margin account is kind of a special brokerage account  
21 where the brokerage firm can loan an individual or an entity  
22 money to buy and sell stock.

23 Q. How typically does a brokerage firm determine how much  
24 money it will lend to a client?

25 A. Well, they would do a credit check, like for any other type

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Carocci - direct

1 of loan. But it generally starts at the initial margin  
2 requirement of 50 percent of the assets cash, and then assets  
3 in the account would be the initial margin. And then it would  
4 depend, again, a lot on the client from there.

5 Q. Does trading on margin allow an investor to buy more stock  
6 than the money that that investor has in the account?

7 A. Yes, it does.

8 Q. Are you also familiar with the type of trade called an  
9 option trade?

10 A. Yes.

11 Q. What is an option trade?

12 A. It's a type of security, like a stock, but it's basically a  
13 contract stating that if the price reaches a certain level at a  
14 certain future date, an individual would have to buy or sell  
15 securities per that contract, according to that contract.

16 Q. Are there special requirements for an investor to have an  
17 account that allows for option trading?

18 A. Yes. So, again, at a brokerage firm, an options account  
19 would also kind of be a special account. The broker would be  
20 responsible for doing what's called a suitability analysis.  
21 Because it's somewhat more sophisticated than just buying and  
22 selling stock, they're required to ensure that the client has a  
23 certain level of sophistication and is suitable for their  
24 investment goals to trade options.

25 Q. Is that also true for margin accounts?

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Carocci - direct

1 A. Yes. Yes.

2 Q. Is there a maximum generally amount of margin that an  
3 investor can use to trade stocks in?

4 A. Well, the initial is 50 percent and then it would go down.  
5 I believe 25 percent equity in the account is the bare minimum.

6 Q. Let's go step by step with explaining what an options trade  
7 is. Are you familiar with something called a call option?

8 A. Yes.

9 Q. What is that?

10 A. Well, that would be an option where the individual writing  
11 or selling that option would agree to sell a stock at a certain  
12 price called a strike price at some future date. And so that  
13 would be the writer or the seller of the call option. That  
14 contract would be bought by somebody.

15 Q. So there is both a buyer and a seller in the market of one  
16 options contract?

17 A. Correct. Just like a stock there -- or any other  
18 transaction. There is a buyer and a seller.

19 Q. What is a put option?

20 A. The put option would give someone the right to sell a stock  
21 at a future date, at a time in the future if a certain price  
22 was met.

23 Q. So the call option is an option to buy the stock and a put  
24 option is the option to sell the stock?

25 A. That's the way I look at it. It is the call option you



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Carocci - direct

1 would be calling in the stock to buy it. And a put option you  
2 would be putting off the stock, selling.

3 Q. If you sell or write an option contract, either a put or a  
4 call option, what, if anything, do you receive as the seller?

5 A. You receive what's called a premium. So, for writing the  
6 contract.

7 Q. Typically, is that a percentage of the stock price?

8 A. Yes. It would be -- yes.

9 Q. In what amounts are option contracts sold?

10 A. They're sold by number of contracts, but one contract would  
11 equal 100 shares of the underlying stock of the contract.

12 Q. You just referenced something called a strike price. Can  
13 you explain what a strike price is.

14 A. That would be the price in the contract that would  
15 determine whether the option is kind of in the money or out of  
16 the money.

17 Q. What other aspects of an options contract are there? In  
18 terms of the duration or the timing --

19 A. Right. So there is an expiration date. So, they expire.  
20 So that's generally when the strike price has to be reached or  
21 not.

22 Q. Now, does each stock have different possible strike prices  
23 for an option contract?

24 A. Yes. Yes. Generally every two and a half dollars.

25 Q. What about are there different options -- maybe I shouldn't

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Carocci - direct

1 use the word "options."

2 Are there different possibilities for the expiration  
3 date of option contracts?

4 A. Yes. They can go out, you know, a month or several months,  
5 for example.

6 Q. How do the strike price and the expiration date of the  
7 options affect the value of the option contract?

8 A. Well, you know, if the price of the security is above the  
9 stock price for a call option, you own that call option, you  
10 would be in the money so it would be valuable. Especially the  
11 expiration date was coming up.

12 Q. Would the value of the price that you purchased the  
13 contract vary depending on how long in the future the  
14 expiration date is?

15 A. Both how long in the future the expiration date is and what  
16 the strike price is, yes.

17 Q. So, if the expiration date was close in time but the stock  
18 price or rather the strike price was further away from the  
19 current stock price, how would that affect the value of the  
20 options contract?

21 A. Well, for the buyer, it wouldn't be that valuable because  
22 it wouldn't appear that the stock would be able to get to the  
23 strike price in that short period of time.

24 Q. In preparation for your testimony today, did you prepare  
25 summary charts?

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Carocci - direct

1 A. Yes.

2 Q. Let me just clarify again. Were you involved in the actual  
3 investigation of this case at any point?

4 A. No.

5 Q. Generally, what do these summary charts that you prepared  
6 relate to?

7 A. The purchases and sales of Dean Foods stocks by Mr. Walters  
8 through his accounts, and his holdings in Dean Foods shares.

9 Q. What types of documents did you rely on to create these  
10 charts?

11 A. I relied on the brokerage account statements for The  
12 Walters Group and Nature Development at Wells Fargo, Barclays,  
13 and JPMorgan. I relied on blue sheet data and Bloomberg price  
14 volume data. And company price releases regarding quarterly  
15 earnings.

16 Q. You mentioned something called blue sheet data. What is  
17 blue sheet data?

18 A. That's trading data. It's a term regulators use for -- the  
19 industry uses for trading data. So it would show all of the  
20 transactions, for example, in a particular stock on a certain  
21 day. It would give you the account that bought or sold, the  
22 number of shares, the price at which they bought or sold, and  
23 you know, the brokerage firm involved.

24 Q. Who generally collects the blue sheet data?

25 A. Well, the firms maintain their trading records so they

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Carocci - direct

1 would maintain records of the buys and sales for an individual.  
2 And then regulators with the SEC can request that information  
3 from them.

4 Q. You mentioned something about Bloomberg data for stock  
5 price and trading volume. What is trading volume?

6 A. Trading volume would be the number of shares of a  
7 particular stock bought or sold on a particular day or during a  
8 particular month. It would be the daily trading volume would  
9 be for a particular day.

10 Q. Where did you obtain these documents and records from?

11 A. The brokerage account statements I obtained from the U.S.  
12 attorney's office, the government. And the blue sheet data I  
13 also obtained through the U.S. attorney's office, I believe via  
14 the Securities and Exchange Commission. The Bloomberg data I  
15 was able to download myself, I have access to Bloomberg. And  
16 the press releases I was able to view on the Dean Foods  
17 website.

18 Q. You've explained blue sheet data. But how long do  
19 brokerage firms maintain their records of trading that would  
20 make up the blue sheet data?

21 A. They are required to keep it for at least six years.

22 MR. GOLDMAN: Your Honor, at this time I'm going to  
23 read another stipulation with the Court's permission.

24 THE COURT: Testimonial or factual?

25 MR. GOLDMAN: It is another testimonial stipulation.

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Carocci - direct

1 THE COURT: Please proceed.

2 MR. GOLDMAN: All of the following exhibits are going  
3 to be admitted at the end of this stipulation.

4 It is hereby stipulated and agreed among the parties  
5 that:

6 1. If called to testify, a representatives of  
7 Wachovia Securities and Wells Fargo Advisors would testify that  
8 Government Exhibits 100-A through 100-L, 101-A through 101-L,  
9 102-A through 102-L, 103-A through 103-L, 104-A through 104-L,  
10 105-A through 105-J, 106 through 112, 113-A through 113-G,  
11 114-A through 114-L, 115-A through 115-L, 116-A through 116-J,  
12 117, 319-A through 319-L, 320-A through 320-L, 321-A through  
13 321-L, 322-A through 322-L, 323-A through 232-L, 324-A through  
14 324-L, 325-A through 325-L and 326-A through 326-L constitute  
15 true and accurate records kept in the regular course of  
16 business.

17 b. the times that appear in Government Exhibits 106  
18 and 107 all reflect Eastern Standard Time or Eastern Daylight  
19 Time, depending on the time of the year.

20 c. Government Exhibit 117 is a true and accurate  
21 glossary of the terms in the column headers of Government  
22 Exhibits 106 and 107.

23 2. If called to testify, representatives Barclays  
24 Capital, Inc. would testify that:

25 a. Government Exhibits 200 through 214, 215-A, 215-B,

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Carocci - direct

1 216-A through 216-C, 217-A through 217-L, 218-A through 218-L,  
2 219, 220-A through 220-C, 221-A through 221-L and 222-A through  
3 222-L constitute true and accurate records kept in the regular  
4 course of business.

5 b. The times that appear in Government Exhibits 200  
6 through 210 and 214 all reflect Greenwich Mean Time which is  
7 four hours ahead of Eastern Daylight Time and five hours ahead  
8 of Eastern Standard Time.

9 3. If called to testify, a representative of Charles  
10 Schwab & Co. would testify that Government Exhibits 300-A  
11 through 300-C, 301-A, 301-B, 302-A through 302-D, 303-A through  
12 303-L, 304-A through 304-L, 305-A through 305-L. Do this  
13 faster. 306 through 311-A through L, 312-A through 312-H,  
14 313-A through 313-E, 314-A through 314-L, 315-A through 315-H,  
15 316-A through 316-E, 317-A through 317-L and 318-A through  
16 318-H constitute true and accurate records kept in the regular  
17 course of business.

18 If called to testify, a representative of JPMorgan  
19 could testify that Government Exhibits 223-A through 223-Q,  
20 224-A through 224-K, and 225-A through 225-I constitute true  
21 and accurate records kept in the regular course of business.

22 If called to testify, a representative of Bloomberg LP  
23 would testify that Government Exhibit 1738 accurately reflects  
24 daily price and volume data for Dean Foods stock.

25 b. Government Exhibits 1739-A through 1739-G are true

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Carocci - direct

1 and accurate excerpts of Government Exhibit 1739.

2 6. If called to testify, a representative of the  
3 United States Securities and Exchange Commission would testify  
4 that Government Exhibits 1740-A through 1740-D, 1741-A through  
5 1741-D, 1742-A through 1742-C, 1743 through 1745, 1746-A  
6 through 1746-C, and 1747 are true and accurate records  
7 reflecting blue sheet data for Dean Foods stock.

8 7. All of the government exhibits listed above and  
9 this stipulation, which is marked Government Exhibit 2101, may  
10 be admitted into evidence.

11 And your Honor, so that I don't have to repeat all  
12 those numbers, the government offers all the aforementioned  
13 exhibits and Government Exhibit 2101 and Government Exhibit  
14 1739.

15 MR. SCHOEMAN: No objection.

16 THE COURT: Received.

17 (Government's Exhibit 100-A to 100-L, 101-A to 101-L  
18 received in evidence)

19 (Government's Exhibit 102-A to 102-L, 103-A to 103-L  
20 received in evidence)

21 (Government's Exhibit 104-A to 104-L, 105-A to 105-J,  
22 106 to 112, 113-A to 113-G received in evidence)

23 (Government's Exhibit 114-A to 114-L, 115-A to 115-L,  
24 116-A to 116-J, 117 received in evidence)

25 (Government's Exhibit 319-A to 319-L, 320-A to 320-L

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Carocci - direct

1 received in evidence)

2 (Government's Exhibit 321-A to 321-L, 322-A to 322-L,  
3 received in evidence)

4 (Government's Exhibit 323-A to 232-L, 324-A to 324-L  
5 received in evidence)

6 (Government's Exhibit 325-A to 325-L 326-A to 326-L  
7 received in evidence)

8 (Government's Exhibit 106, 107, 117, 200-210, 214  
9 received in evidence)

10 (Government's Exhibit 200-214, 215-A, 215-B, 216-A to  
11 216-C, 217-A to 217-L received in evidence)

12 (Government's Exhibit 218-A to 218-L, 219, 220-A to  
13 220-C received in evidence)

14 (Government's Exhibit 221-A to 221-L, 222-A to 222-L  
15 received in evidence)

16 (Government's Exhibit 300-A to 300-C, 301-A, 301-B,  
17 302-A to 302-D received in evidence)

18 (Government's Exhibit 303-A to 303-L, 313-A to 313-E  
19 received in evidence)

20 (Government's Exhibit 304-A to 304-L, 305-A to 305-L  
21 received in evidence)

22 (Government's Exhibit 306 to 311-A through L, 312-A to  
23 312-H received in evidence)

24 (Government's Exhibit 314-A to 314-L, 315-A to 315-H  
25 received in evidence)



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Carocci - direct

1 (Government's Exhibit 316-A to 316-E, 317-A to 317-L  
2 received in evidence)

3 (Government's Exhibit 318-A to 318-H, 223-A to 223-Q,  
4 224-A to 224-K received in evidence)

5 (Government's Exhibit 225-A to 225-I, 1738, 1739  
6 received in evidence)

7 (Government's Exhibit 1739-A to 1739-G, 1741-A to  
8 1741-D received in evidence)

9 (Government's Exhibit 1742-A to 1742-C, 1743 to 1745  
10 received in evidence)

11 (Government's Exhibit 1746-A to 1746-C, 1747 received  
12 in evidence)

13 (Government's Exhibit 2101 and 1739 received in  
14 evidence)

15 Q. Mr. Carocci, if you can look in front of you, there is a  
16 stack of papers marked Government Exhibits 2000 through 2014.  
17 If you can leaf through those. Do you recognize these  
18 exhibits?

19 A. Yes.

20 Q. What are they?

21 A. The exhibits I created in preparation for trial today.

22 Q. These are the summary charts that you referenced before?

23 A. Yes, they are.

24 MR. GOLDMAN: The government offers Government Exhibit  
25 2000 through 2014.

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Carocci - direct

1 MR. SCHOEMAN: No objection.

2 THE COURT: Received.

3 (Government's Exhibit 2000 through 2014 received in  
4 evidence)

5 MR. GOLDMAN: If we may now publish Exhibit 2000,  
6 please.

7 Q. Focusing first on Government Exhibit 2000, Mr. Carocci.  
8 What does this chart show?

9 A. It shows Mr. Walters' holdings in Dean Foods stock and the  
10 Dean Foods stock price, the closing price for the year 2008.

11 (Continued on next page)

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Carocci - direct

1 MR. GOLDMAN: Ms. Pyun, is there any way to zoom in a  
2 little bit?

3 Q. What is the vertical left axis?

4 A. So that represents Mr. Walters' holdings, the number of  
5 shares that he holds, and it relates to the red line that goes  
6 across the bottom of the chart. So, for example, at the  
7 beginning of the year, in January 2008, Mr. Walters is holding  
8 500,000 shares of Dean Foods stock.

9 Q. What is the vertical right axis?

10 A. That's the stock price axis. So that's the axis from zero  
11 to 30 that gives the range at which the stock closed at during  
12 the year 2008.

13 Q. OK. Now, in January, at the beginning of the year, what is  
14 the highest stock price -- I will use the little clicker which  
15 doesn't work, there it is -- right up there, what is that?

16 A. Approximately \$28, which is the highest price for the year,  
17 that year.

18 Q. Now, in February and March, what is the stock price doing  
19 in here?

20 A. It is declining over February and March 2008.

21 Q. And then at the same time that it's declining, there's an  
22 uptick in the red line. What does that mean?

23 A. It's Mr. Walters' holdings increasing to over 1.5 million  
24 shares from zero to then over 2 million shares.

25 Q. In the middle of the page there is a significant uptick in

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Carocci - direct

1 the red line for his holdings. How many shares does he own at  
2 this point?

3 A. There are approximately 4 million shares, if you look at  
4 the left-hand axis.

5 Q. And approximately what is the stock price corresponding to  
6 the time when he owns the 4 million shares right in there?

7 A. It's approximately \$18 a share.

8 Q. So at that point how much were his 4 million shares worth?

9 A. Approximately \$72 million.

10 Q. Now, moving on later in the year, in late October and early  
11 November, what does the stock price do in this period?

12 A. It declines from over \$20 to it looks like close to --  
13 over \$21 to close to \$12.

14 Q. And what does Mr. Walters do around that same time when it  
15 is declining?

16 A. He's increasing his holdings in Dean Foods shares.

17 MR. GOLDMAN: If we could now go to Government Exhibit  
18 2001 and zoom in. Thank you.

19 Q. What does this chart show?

20 A. This shows the Dean Foods stock price and Mr. Walters'  
21 trading activity, his purchases and sales of Dean Foods stock  
22 for the year 2008.

23 Q. Now, there are green and red lines on the bottom. Can you  
24 explain to the jury what the green and red columns are?

25 A. Yes. If it's a green column, it represents a purchase by

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Carocci - direct

1 Mr. Walters, and if it is a red column, it will represent a  
2 sale of Dean Foods stocks by Mr. Walters.

3 Q. And then how does the left axis correspond to those  
4 purchases and sales, the vertical axis?

5 A. The left vertical axis represents the shares sold and  
6 purchased. That's what that number represents. And then the  
7 horizontal axis would be the date axis.

8 Q. And the blue line, is that the same blue line of the stock  
9 price that we saw in Government Exhibit 2000?

10 A. Yes. That's the closing price for 2008.

11 Q. And then there are four orange boxes on here. What do  
12 those reflect?

13 A. They reflect the earnings announcements, the Dean Foods'  
14 earnings announcements that were made on a quarterly basis  
15 during 2008.

16 Q. And in the middle there is a pink box that says June 25,  
17 2008 press release, what is that?

18 A. There was a press release from Dean Foods on June 25th of  
19 2008.

20 Q. Now, I want to focus your attention in the early part of  
21 the year in March and April. What is Mr. Walters doing here?

22 A. Mr. Walters is purchasing shares of Dean Foods stock, and  
23 that's represented by the green columns above the March and  
24 April 2008 dates.

25 Q. Now, this arrow up here, what is that arrow from the

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Carocci - direct

1 April 30, 2008 Q-1 earnings announcement, what does that arrow  
2 mean?

3 A. It's pointing basically to April 30, 2008 on the line to  
4 better kind of depict the price movement.

5 Q. And from your review of these earnings announcements, when  
6 during the day did Dean Foods typically make its earnings  
7 announcements?

8 A. They are generally released in the mornings prior to the  
9 New York Stock Exchange opening. So that would be at 9:30.  
10 And these earnings announcements would generally be released to  
11 the public in the morning hours prior -- prior to that.

12 Q. So after the April 30, 2008 earnings announcement, what  
13 does Mr. Walters do with his stock?

14 A. He sells, and that's represented by the red columns, in May  
15 of 2008, the red columns at the bottom.

16 Q. Now, we're going to get to the June 25, 2008 press release  
17 with the next chart. So I want to focus now your attention  
18 toward the end of the year, the November 4, 2008 earnings  
19 announcement.

20 What does this arrow reflect again; can you remind the  
21 jury?

22 A. It reflects the earnings announcement was being made  
23 November 4, 2008, prior to the market opening.

24 Q. And what does Mr. Walters do shortly after that  
25 announcement?

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Carocci - direct

1 A. He purchases Dean Foods stock, and that's represented by  
2 the green columns, in the late October/early November range at  
3 the bottom.

4 Q. Now, I want to just direct your attention for a minute to  
5 this June 2008 press release.

6 That arrow reflects when that press release was  
7 announced as in correlation to the stock price, is that right?

8 A. Yes.

9 Q. And what did Mr. Walters do just before that press release  
10 was issued?

11 A. He purchased shares for the couple of days leading up to  
12 that press release.

13 Q. Right after, the big red column, what is the date of that  
14 red column?

15 A. I believe it's the 25th, and he sells 1.75 million shares.

16 Q. And I just want to point -- direct your attention to the  
17 middle of July here. What happens with these columns here?

18 A. The middle of July, there are red columns, so Mr. Walters  
19 is selling Dean Foods stock.

20 Q. And then how does the stock price when he sells in mid-July  
21 correspond to the price just before that press release  
22 announcement?

23 A. Well, it's lower. In fact, it even goes a little bit lower  
24 than prior to the press release.

25 Q. And then shortly after his sales, what does the price of

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Carocci - direct

1 the stock do through the rest of the July and August into  
2 September?

3 A. It increases, the stock price increases.

4 Q. Now, can we turn to Government Exhibit 2002, please, and  
5 zoom in.

6 What is this chart, Mr. Carocci?

7 A. This is the Dean Foods stock price and Mr. Walters'  
8 percentage of trading for June of 2008. So it's just, you  
9 know, the June subsection of really the previous chart.

10 Q. Now, remind the jury what the column on the left is.

11 A. Right. That's the shares sold/purchase column. So it  
12 represents the number of shares purchased or sold by  
13 Mr. Walters.

14 Q. And then on the bottom there are dates. What are those  
15 dates on the chart?

16 A. They are the market dates. So they would be the dates in  
17 June where the stock market was open and Dean Foods was  
18 trading.

19 Q. And then there are five what look to be sort of light blue  
20 boxes or purple boxes that are reflected with the percentage of  
21 TMV. Do you see those?

22 A. Yes.

23 Q. What are those?

24 A. That is the percentage of the total market trading volume,  
25 the Bloomberg trading volume, that Mr. Walters' transactions is



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Carocci - direct

1 responsible for.

2 Q. Now, have you reviewed generally the trading volume for  
3 Dean Foods from 2008 through 2014?

4 A. Yes.

5 Q. Is there a common range of trading volume for Dean Foods  
6 throughout that period of time?

7 A. There is, you know, no special news or announcement. It  
8 generally trades within the 3- to 5-million shares a day when  
9 there is no special news or announcements.

10 Q. In your review, when is the trading volume generally the  
11 highest?

12 A. Well, generally when there's information about the company  
13 being made public. It would either generally encourage -- if  
14 it is positive, it could encourage people to want to buy the  
15 stock. If it is negative, it could encourage people to sell  
16 the stock. But either way, the trading volume is generally  
17 affected and increasing.

18 Q. Let's focus on this chart here. What do we have on this  
19 first column, which I believe is dated June 19, 2008.

20 A. Right. It's a purchase by Mr. Walters of, you know,  
21 approximately 1.8 million shares.

22 Q. And then in the box, it says "37 percent of TMV." What  
23 does that mean?

24 A. So that approximately 1.8 figure represents 37 percent of  
25 the total market volume, Bloomberg volume, for Dean Foods on

H3kdwal5

Carocci - direct

1 that date.

2 Q. Is that a large percentage of the daily trading volume?

3 A. Yes. I mean, it's 37 percent.

4 Q. And then the next day, what do we see here on June 20th?

5 A. That Mr. Walters again purchases shares, and these  
6 purchases represent 33 percent of the total market volume for  
7 that particular day.

8 MR. GOLDMAN: Ms. Pyun, maybe we could zoom in on the  
9 right half of the chart, if that's possible.

10 Q. And then the third green column, what is that?

11 A. It's another purchase of Dean Foods, and on that date it  
12 represents 29 percent of the total market volume, Bloomberg  
13 volume.

14 Q. Now, this is June 23rd and the previous one was  
15 June 20th and June 19th. What is June 21st and 22nd?

16 A. Those are a Saturday and Sunday so the stock market was  
17 closed.

18 Q. Now, looking at the top of the screen, there is this  
19 June 25, 2008 press release again. And when -- remind the jury  
20 when during the day that was released?

21 A. In the morning, prior to the stock market opening.

22 Q. And then on that same day, on June 25th, what does this red  
23 column represent?

24 A. It represents a sale of Dean Foods stock -- the sales of  
25 Dean Foods stocks on that day by Mr. Walters.

H3kdwal5

Carocci - direct

1 Q. And what percentage of the total market volume was that  
2 sale that day?

3 A. 20 percent.

4 Q. Now, this red column appears to be almost pretty similar to  
5 the first green column, yet the green column was 37 percent of  
6 the total market volume. Can you explain the difference why  
7 this was 37 percent of the total market volume and this sale is  
8 20 percent of the total market volume?

9 A. Yes. There was a, you know, increase in trading volume on  
10 that date, the date of the press release. So, you know, about  
11 1.75, 1.8 million shares on June 25th only represents  
12 20 percent of the total market volume, whereas before the press  
13 release, on June 19th of 2008, about 1.8, 1.75 million shares  
14 represents 37 percent of the total Bloomberg volume.

15 Q. And was this sale on June 25th after the announcement  
16 through that press release?

17 A. Yes.

18 Q. And then, finally, on the next day, there is an additional  
19 sale of 250,000 shares. What percentage of the total market  
20 volume is that on June 26th?

21 A. 9 percent.

22 Q. Now, did you have blue sheet data for this time period to  
23 analyze as well?

24 A. I did not.

25 Q. And remind the jury how long brokerage firms must retain

H3kdwal5

Carocci - direct

1 their books and records, including their trading data?

2 A. At least six years.

3 MR. GOLDMAN: Now if we could move to Government  
4 Exhibit 2003. Please zoom in.

5 Q. What does this chart shows?

6 A. It shows Mr. Walters' holdings of Dean Foods and the Dean  
7 Foods stock price for the year 2009.

8 Q. But is it similar to Government Exhibit 2000 but just for  
9 the next year?

10 A. Correct. It is for the year 2009, but in other respects  
11 it's very similar to Government Exhibit 2000 or 2000 full year  
12 2008.

13 Q. How much stock did Mr. Walters come into the year 2009  
14 with?

15 A. 1.5 million shares.

16 Q. And was that the most that he held for any significant  
17 period of time that year?

18 A. Yes.

19 Q. And what did the stock price do during this year?

20 A. You know, it really trades I think within a narrow range  
21 of, you know, maybe \$16 to 20 -- to \$20 perhaps.

22 Q. It remained relatively flat during the course of the year?

23 A. I would say relatively flat.

24 MR. GOLDMAN: Now if we could go to Government Exhibit  
25 2004, please?

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Carocci - direct

1 THE COURT: All right. Ladies and gentlemen, you are  
2 going to be in suspense on Exhibit 2004. You are just going to  
3 have to wait until after our break. OK? So we are going to  
4 take a short recess.

5 Please do not discuss the case among yourselves or  
6 anyone else. We will be back in action in ten minutes.

7 Thank you.

8 (Continued on next page)

9 (Jury not present)

10 THE COURT: We are in recess.

11 (Recess)

12 THE COURT: Bring our jurors in, please.

13 (Jury present)

14 THE COURT: All right. Ladies and gentlemen, we are  
15 back in action.

16 Mr. Goldman, keep us in suspense no longer.

17 MR. GOLDMAN: All right, your Honor.

18 Let's pull up Government's Exhibit 2004.

19 BY MR. GOLDMAN:

20 Q. And, Mr. Carocci, what does this chart reflect?

21 A. Mr. Walters' holding in the Dean Foods stock price for the  
22 year 2010.

23 Q. Now, what is it showing when this red line is going up and  
24 down so much throughout the course of the year?

25 A. It would be Mr. Walters' adding or subtracting from his

H3kdwal5

Carocci - direct

1 Dean Foods holdings.

2 Q. When does he first buy Dean Foods in the year 2010?

3 A. Around April 2010, the beginning of April 2010.

4 Q. And how much does he buy in April 2010?

5 A. 1.5 -- one-and-a-half million shares.

6 Q. And approximately where is the stock price when he buys the  
7 1.5 million shares in April?

8 A. It appears to be about approximately \$17 per share.

9 Q. And then at the end of the year where does the stock price  
10 end?

11 A. Approximately \$9 per share.

12 Q. And how much does he own at the end of the year 2010?

13 A. 1 million shares.

14 Q. Now, if we could go to Government Exhibit 2005.

15 What does this chart show?

16 A. It is Mr. Walters' purchases and sales of Dean Foods for  
17 the year 2010 along with the stock price.

18 Q. And, once again, what is in the orange boxes?

19 A. The quarterly earnings announcements for the year 2010.

20 Q. Now, in a minute we're going to focus on the May 2010  
21 earnings and the November 2009 earnings, but let me just draw  
22 your attention to June of this year.

23 Do you see two red lines right there? It is hard to  
24 tell but in the middle of June.

25 A. Yes.

H3kdwal5

Carocci - direct

1 THE COURT: June 2010.

2 MR. GOLDMAN: Yes. What did I say?

3 THE COURT: "This year."

4 MR. GOLDMAN: So, June 2010.

5 Q. Can you explain to the jury what those red lines are?

6 A. They are sales from Mr. Walters' account in Dean Foods  
7 shares. These sales were related to the call options that  
8 Mr. Walters sold.

9 Q. So let's take that step-by-step.

10 What did -- remind the jury again of what the call  
11 options are.

12 A. Right. It is an option where one person or entity sells  
13 the right to another individual to call in or to buy their  
14 shares at a certain price, the strike price, at a certain date  
15 in the future.

16 Q. And which side of this contract did Mr. Walters take?

17 A. He sold the call option; he wrote the call option.

18 Q. When did he do that?

19 A. In May -- May 11, 2010.

20 Q. And once again, the earnings announcement was May 10, 2010,  
21 is that right?

22 A. Correct.

23 Q. And was that earnings announcement made before or after the  
24 market had opened?

25 A. Before.

H3kdwal5

Carocci - direct

1 Q. And we see that after this earnings announcement, the stock  
2 drops significantly, right?

3 A. Yes. It declines steeply.

4 Q. And he wrote these call options, you said, on May 11th?

5 A. Correct.

6 Q. Now, if you're looking at your screen there, there are a  
7 number of green columns that follow that May 10th, 2010  
8 earnings announcement, is that right?

9 A. Yes.

10 Q. And are the call options that he wrote reflected here in  
11 May of 2010?

12 A. No, because they're contracts so I just have -- the chart  
13 is just for stocks.

14 Q. So why did you include the sale in June of 2010?

15 A. Well, because they are actually sales of stock.

16 Q. So when -- so explain what he did with these call options  
17 when he sold them. What was the strike price?

18 A. It was \$10 per share.

19 Q. And when was the expiration date of these call options?

20 A. One of them was in May, the third Friday in May. The  
21 others were in June, the third Friday in June.

22 Q. So what does it mean when he sold the call options with the  
23 strike price of \$10?

24 A. It meant that the buyer of the call option exercised his  
25 rights under the contract to be able to purchase the shares



H3kdwal5

Carocci - direct

1 from Mr. Walters for \$10 per share. So the stock price was  
2 trading at approximately \$10.80 a share, I believe, so it was  
3 in the money. The strike price was below the actual trading  
4 price of the stock.

5 Q. So because of that Mr. Walters had to sell at \$10 to this  
6 buyer?

7 A. To the other person on the other side of the contract,  
8 correct.

9 Q. Now, if the stock had -- Dean Foods' stock had gone down  
10 to \$8, let's say, what would have happened to Mr. Walters'  
11 option contracts?

12 A. They would have expired. The buyer of the option contract  
13 would not have exercised the right to call in those shares, to  
14 buy those shares, because he would have to pay \$10 a share for  
15 them under the contract. And why would someone pay \$10 per  
16 share for Dean Foods stock when they can go into the market and  
17 buy it for \$8 per share? So the contract would simply expire  
18 on exercise.

19 Q. If the contract was not exercised, would Mr. Walters have  
20 made any money on these options?

21 A. He would have made his premium for writing the options and  
22 selling the options.

23 Q. And focusing your attention toward the end of August of  
24 2010, beginning of September. There are a number of red  
25 columns there. What do those represent again?

H3kdwal5

Carocci - direct

1 A. They represent Mr. Walters' sales in those months of Dean  
2 Foods.

3 Q. So does he end up selling all of the Dean Foods stock that  
4 he purchased right after the May 2010 announcement during that  
5 period?

6 A. Yes.

7 Q. And then shortly after, in early October, he begins buying  
8 again?

9 A. Yes.

10 MR. GOLDMAN: Now, if we could turn to Government  
11 Exhibit 2006, please.

12 Zoom in.

13 Q. What is this chart?

14 A. This is Mr. Walters' trading activity in the Dean Foods  
15 stock price from a subset of 2010, just April 1st through  
16 May 31st, 2010, just that two-month period.

17 Q. And what are the purple boxes again?

18 A. They represent the percentage that Mr. Walters'  
19 transactions were on those days to the overall Bloomberg  
20 trading volume.

21 Q. And there is also an asterisk on these boxes. What does  
22 that asterisk mean?

23 A. Where there is an asterisk, it means that, per the blue  
24 sheet data, Mr. Walters' transaction was either the largest  
25 purchase or the largest sale on that date as far as raw number

H3kdwal5

Carocci - direct

1 of shares, that the transaction -- the transaction number of  
2 shares.

3 Q. Sorry. What do you mean, "the transaction number of  
4 shares?"

5 A. Well, you know, the trading, the single transaction.

6 Q. So if there is an asterisk there, it was either the largest  
7 purchase or the largest sale of Dean Foods' stock on that date?

8 A. Correct.

9 Q. And you got that from the blue sheet data?

10 A. Yes.

11 Q. Let's focus on April 12th, if we could.

12 What did Mr. Walters do on April 12th?

13 A. He purchased 1 million shares of Dean Foods.

14 Q. And what percentage of the total market volume was that?

15 A. 21 percent.

16 Q. And was that the largest purchase on that date?

17 A. Yes, it was.

18 Q. And then going ahead to April 14th, what did he do on that  
19 date?

20 A. He purchased 500,000 shares of stock.

21 Q. And what percentage of the total market volume was that  
22 transaction?

23 A. 19 percent.

24 Q. Now -- and was that also the largest purchase?

25 A. Yes.

H3kdwal5

Carocci - direct

1 Q. Now, you had mentioned earlier in your testimony that you  
2 reviewed records, brokerage accounts, for The Walters Group and  
3 Nature Development. Can you explain what these green and red  
4 lines reflect as it relates to both of those brokerage  
5 accounts?

6 A. Right. So, you know, they are aggregated. So, for  
7 example, if -- on May 3rd, for example, there is sales in both  
8 of the Nature Development account and the Walters Group  
9 account.

10 Q. Now, just focusing on this asterisk here where you talk  
11 about the largest purchase or transaction, in theory, is it  
12 possible that another investor could have multiple accounts and  
13 could have purchased more than what you have noted as the  
14 largest purchase or sale transaction of a particular day?

15 A. Yes. If there was someone with related accounts and  
16 executed a bunch of smaller transactions that equaled more than  
17 500,000 shares, for example, on April 14th, that's right, that  
18 would not be included. This is the largest single purchase.

19 Q. Is that difficult for you to determine, whether that  
20 aggregate of many small trades occurred?

21 A. It is because you don't know the interrelation between the  
22 other trades that are reflected in the blue sheet data. You  
23 don't know if those accounts have common ownership or not. All  
24 I see really is a name, a name and account number. So we  
25 aggregated Mr. Walters' accounts, but I didn't have enough

H3kdwal5

Carocci - direct

1 information to aggregate the other accounts.

2 Q. And is that true for all of the asterisks in these charts?

3 A. Yes, it is.

4 Q. Now, in the middle of the page, on May 3rd, 2010, you have  
5 a red line here. What does that represent?

6 A. Mr. Walters' sales of Dean Foods on May 3, 2010.

7 Q. And what percentage of the total market volume is that?

8 A. 29 percent. This is an example of where there were two  
9 transactions. There was a 510,000 share transaction in the  
10 Walters Group account, and then there was an approximately a  
11 380,000 share sale in the Nature Development account. The  
12 reason the asterisk is there is because the 510,000 sale in The  
13 Walters Group account was the largest single transaction on  
14 that date.

15 Q. On May 4, 2010, what did Mr. Walters do?

16 A. He sold a little over 600,000 shares of Dean Foods stock.

17 Q. Between May 3rd and May 4th, how much -- how many shares of  
18 Dean Foods did Mr. Walt sell?

19 A. Approximately 1.5 million shares.

20 Q. Is that the same 1.5 million shares that he purchased on  
21 April 12th and 14th?

22 A. Yes.

23 Q. And so those purchases on April 12th and/or April 14th also  
24 aggregated The Walters Group and Nature Development accounts?

25 A. Yes, they are.

H3kdwal5

Carocci - direct

1 Q. Now, at the top you have the orange box, the Q-1 earnings  
2 announcement, May 10, 2010. Does this line represent where the  
3 stock price was when that announcement was made?

4 A. Yes.

5 Q. And what did the stock do right after that announcement was  
6 made?

7 A. It declined sharply.

8 Q. And on that same day, May 10, 2010, what did Mr. Walters  
9 do?

10 A. He purchased 1 million shares of Dean Foods stock.

11 Q. Now, you don't have the total percentage -- total market  
12 volume for that 1 million share purchase on here, do you?

13 A. I do not.

14 Q. Do you recall what the total volume for Dean Foods stock  
15 was on May 10, 2010?

16 A. Yes. It was 47 million -- approximately 47 million shares.

17 MR. GOLDMAN: Ms. Pyun, if we could do a little  
18 side-by-side here and move this to one side and pull up  
19 Government Exhibit 1739C at page 2. And if we could zoom in on  
20 that April and from the middle of the page down.

21 (Pause)

22 Q. There you see May 10th; is that the 47 million shares that  
23 you referenced there?

24 A. Yes.

25 Q. And then how many shares were traded the following day?

H3kdwal5

Carocci - direct

1 A. Over 33 million shares.

2 Q. Now, is that 47 million an unusually high volume for Dean  
3 Foods stock in your review of these trading records?

4 A. Yes. I believe it was the highest, actually.

5 Q. Let's, as an example, on May 3rd, when he sold some of his  
6 stock, what was the total market volume that day?

7 A. A little over 3 million shares.

8 Q. And May 4th, what was the volume?

9 A. 3,782,000 shares.

10 MR. GOLDMAN: If we can take down 1739 and blow the  
11 chart back up.

12 Q. On May 14, 2010, what did Mr. Walters do?

13 A. On May 14, 2010, Mr. Walters purchased 500,000 shares.

14 Q. And so how many shares of Dean Foods did Mr. Walters own as  
15 of May 14, 2010?

16 A. Well, he purchased 1.5 million shares between May 10th and  
17 May 14th of 2010.

18 Q. And was that the same amount that he had purchased on  
19 April 12th and April 14th of 2010?

20 A. Approximately the same amount, yes.

21 Q. And how did the cost of the 1.5 million shares that he  
22 purchased on May 10th and May 14th compare to the cost of the  
23 same 1.5 million share amount of Dean Foods' stock that he  
24 purchased on April 12th and April 14th?

25 A. Well, on April 12th and April 14th, he was purchasing it at

H3kdwal5

Carocci - direct

1 roughly 16 or \$17 per share, and then May 10th through the  
2 14th he's repurchasing 1.5 million shares for, you know,  
3 approximately \$10 per share.

4 Q. So it is a significant reduction in the cost of those  
5 shares?

6 A. Yes. I would say \$6 or \$7 is a significant reduction.

7 Q. And then what occurs on May 19, 2010?

8 A. There is an additional purchase of shares.

9 Q. And the following day?

10 A. Another smaller purchase.

11 Q. And then May 24th there is a small sale. What is that?

12 A. Correct. That's a sale -- that was the sale for the call  
13 option, the one call option that did expire in May. That  
14 sale -- the assignment of that option was to cover that sale.

15 MR. GOLDMAN: All right. If we could go to Government  
16 Exhibit 2007 now, Ms. Pyun. And zoom in, please.

17 Q. What does this chart reflect, Mr. Carocci?

18 A. Mr. Walters' trading activity from October 1st through  
19 November 15th of 2010, so, again, a subsection of the overall  
20 2010 trading activity.

21 Q. I think by this point we are all caught up. The colors all  
22 reflect the same thing as they did on the last chart as well?

23 A. Correct. Green for purchases. Red for sales.

24 Q. And purple for total market volume?

25 A. Yes. Total market volume, and asterisk for largest



H3kdwal5

Carocci - direct

1 purchase or sale on the corresponding date at the bottom of the  
2 chart.

3 Q. What did Mr. Walters do on October 4, 2010?

4 A. On October 4, 2010, he purchased I believe approximately  
5 800,000 shares of stock.

6 Q. And the next day?

7 A. He purchased again some additional stock.

8 Q. And on October 4th, what percentage of the total market  
9 volume was his purchase?

10 A. 14 percent.

11 Q. And did that include the largest purchase of any one volume  
12 of Dean Foods stock on that date?

13 A. Yes.

14 Q. Now, combined together, how many shares did he purchase on  
15 October 4th and 5th?

16 A. On October 4th and 5th, he purchased 1 million shares.

17 Q. And then the following day, on October 6th, he also  
18 purchased more, is that right?

19 A. Correct, a little less than 250,000 shares.

20 Q. And what about October 7th?

21 A. A little more than 250,000 shares. Those two days totaled  
22 an additional 500,000 shares on top of the 1 million bought on  
23 the 4th and 5th.

24 Q. What is the total number of shares he purchased in those  
25 four days?

H3kdwal5

Carocci - direct

1 A. 1.5 million shares.

2 Q. Now, Mr. Carocci, when large trades such as these are  
3 ordered, how are they executed?

4 A. Well, you know, a broker tries to get the best price for  
5 their client, meaning if it's a purchase order, they want to  
6 buy it at the lowest price possible. So if it is a large  
7 order, the order may be broken down so that the broker doesn't  
8 have to execute it -- the trader doesn't have to execute it all  
9 at once and, you know, really hit all the -- all of the prices,  
10 driving the price up. So at times they'll break it up to try  
11 and get price improvement, they'll break a large order up to  
12 try and get price improvement for their client.

13 Q. If a broker received an order to purchase 1 million shares  
14 of Dean Foods stock on a particular day and the total trading  
15 volume was around 3 million and that broker just entered the  
16 order, what would happen to the stock?

17 A. Well, I mean, it could drive the stock price higher. It  
18 could drive the stock price higher, because there would be  
19 demand on the buy side.

20 Q. So what do the brokers try to do in order to prevent the  
21 stock from being driven up?

22 MR. SCHOMAN: Objection. Speculation.

23 THE COURT: Sustained.

24 MR. GOLDMAN: Let's move on, then.

25 Q. On October 21, 2010, what did Mr. Walters do?

H3kdwal5

Carocci - direct

1 A. He sold approximately 400,000 shares of stock.

2 Q. And the following day, October 22nd?

3 A. He sold 1.1 million shares of stock.

4 Q. And what was the percentage of the total market volume on  
5 that day?

6 A. 1. -- well --

7 Q. On October 22nd. Sorry. Percentage of the total?

8 A. I'm sorry. 30 percent -- the 1.1 million shares  
9 represented 30 percent of the total market volume on that day.

10 Q. And both of those transactions were the largest sales of  
11 their respective days, is that right?

12 A. Yes.

13 Q. And so on October 21st and October 22nd, he sold the 1.5  
14 million shares that he had purchased from October 4th through  
15 October 7th, is that correct?

16 A. Yes.

17 MR. GOLDMAN: If we could, Ms. Pyun, put this on one  
18 side and pull up Government Exhibit 1739C at page 5.

19 Q. Now, before I get there, you have in the orange box the  
20 earnings announcement, is that correct?

21 A. Yes.

22 MR. GOLDMAN: Ms. Pyun, I don't know if we can pull  
23 that up, pull that out, blow it up a little bit for the jury.

24 Q. Does that arrow point to where the stock price was at the  
25 time of that announcement?

H3kdwal5

Carocci - direct

1 A. Yes.

2 Q. And what did Mr. Walters do on November 9, 2010 -- sorry.  
3 Withdrawn.

4 When during the day -- we can blow that back up,  
5 Ms. Pyun, so we can see the whole thing.

6 When during the day was this announcement made?

7 A. In the morning, before the market opened.

8 Q. What did Mr. Walters do on November 9, 2010, after the  
9 announcement was made?

10 A. He purchased 1 million shares in the market after the  
11 market opened.

12 Q. And, once again, you don't have a purple box there, is that  
13 right?

14 A. Correct.

15 Q. Can you look on the right side and tell us November 9,  
16 2010, what the total volume was on that day?

17 A. It was over 31 million shares.

18 Q. And how about the next day?

19 A. Over 30 million shares.

20 Q. What did the stock price do after this earnings  
21 announcement?

22 A. It declined.

23 Q. Then just for frame of reference, if we could go back to  
24 October 21st. What was the volume on that day?

25 A. 4,467,971 shares.

H3kdwal5

Carocci - direct

1 Q. And on the 22nd, the day that Mr. Walters sold 1.1 million  
2 shares, what was the total market volume that day?

3 A. 3,608,633 shares.

4 MR. GOLDMAN: We can take that down now.

5 Now, if we could go to Government Exhibit 2008,  
6 Ms. Pyun.

7 Q. What is this chart, Mr. Carocci?

8 A. Mr. Walters' holding in the Dean Foods closing price for  
9 the year 2011.

10 Q. And how much stock of Dean Foods did Mr. Walters own at the  
11 beginning of the year?

12 A. Approximately 1 million shares.

13 Q. What does he do in early January with that 1 million  
14 shares?

15 A. Sells, sells those shares.

16 Q. Do you know what date that sale was?

17 A. I believe it was January 7th.

18 MR. GOLDMAN: And if we could pull up side-by-side,  
19 Ms. Pyun, if we could go to Defense Exhibit 1124, please, and  
20 zoom in on the email.

21 Q. Mr. Carocci, have you ever seen this document before?

22 A. No.

23 Q. If you could just read the date of the email sent by Tom  
24 Davis to Gregg Engles on the bottom?

25 A. It's January 7, 2011 at 7:13 at night, Central Standard

H3kdwal5

Carocci - direct

1 Time.

2 Q. OK. And then Mr. Davis writes to Mr. Engles, "Did you know  
3 anything about Appaloosa before today? Interesting investment.  
4 Happy new year."

5 All right. We could pull out of that.

6 Now, is that sale of the million shares the same  
7 million shares that he purchased on November 9th after the  
8 earnings announcement?

9 A. Yes. I believe it is, yes.

10 Q. And after he sells the million shares on January 7th, when  
11 is Mr. Walters' next Dean Foods transaction?

12 A. It looks like there is some activity in the end of July,  
13 the beginning of August 2011.

14 Q. So he doesn't purchase any Dean Foods stock from  
15 January 7th until the middle of July, is that right?

16 A. Correct.

17 Q. And it is kind of hard to tell here but it looks a little  
18 bit like where he purchased, the stock price was around what  
19 price in mid-July?

20 A. You know, it looked like around 10/\$11 per share, perhaps.

21 Q. And then when he sold where was it?

22 A. Lower. It looks like a little below \$9 per share.

23 Q. So it looks like he lost a little money on that --

24 A. Correct.

25 Q. -- transaction?

H3kdwal5

Carocci - direct

1 And toward the back half of the year of 2011, how does  
2 the stock price -- how does the stock do?

3 A. It increases a little bit, it looks like from \$9 to maybe  
4 10. It is pretty flat.

5 Q. And there is a little blip in the middle of September 2011.  
6 What is that?

7 A. A little blip in September. Where?

8 Q. I can show you right here. It goes up a little bit and  
9 then --

10 A. Right. Right. There were 58,900 shares bought in the  
11 JPMorgan account of Mr. Walters, and that represents 58,900  
12 shares.

13 Q. Based on your review of his brokerage records, was that his  
14 primary brokerage account?

15 A. Not for Dean Foods, no.

16 Q. For how long did he own the 58,900 shares in the JPMorgan  
17 account?

18 A. Several years.

19 MR. GOLDMAN: And if we could move to Government  
20 Exhibit 2010. Sorry, 2009, rather. I skipped one.

21 Q. What is this chart, Mr. Carocci?

22 A. Mr. Walters' holdings in Dean Foods for the year 2012.

23 Q. At the beginning of the year, how much Dean Foods stock did  
24 Mr. Walters own?

25 A. The 58,900 shares in the JPMorgan account that I mentioned

H3kdwal5

Carocci - direct

1 earlier.

2 Q. When does he make his first purchase of Dean Foods stock in  
3 2012?

4 A. May, around May 2012.

5 Q. And from January 1st to his purchase in May, how did the  
6 stock -- how did the stock price move?

7 A. Pretty flat, maybe up slightly.

8 Q. By the end of the year, how much Dean Foods stock did  
9 Mr. Walters own?

10 A. Approximately 5.4 million shares.

11 Q. And if you could look up on the screen, do you see this  
12 little bump here in October of 2012?

13 A. Yes.

14 (Continued on next page)

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H3K3WAL6

Carocci - direct

1 Q. Do you know what happened right before -- right around this  
2 date here, October 17?

3 A. I think it was the WhiteWave IPO announcement.

4 Q. Approximately what was the value of Dean Foods' stock at  
5 the height of its value in 2012?

6 A. Approximately 19, \$20 per share.

7 Q. So can you estimate for the jury how much Mr. Walters'  
8 approximate 5.4 million shares of Dean Foods was worth at the  
9 time, at the height of the stock price right here around \$19?

10 A. Total holding would be worth approximately \$100 million.

11 MR. GOLDMAN: If we can go now to Government Exhibit  
12 2010.

13 Q. What does this chart reflect, Mr. Carocci?

14 A. Mr. Walters' trading activity from May 1st through  
15 November 1st of 2012, so a subsection.

16 Q. On the left side, we see here the earnings announcement on  
17 May 9, 2012. Do you see that orange box there?

18 A. Yes.

19 Q. And the arrow goes right to where the pointer is at the  
20 bottom of the stock price on the left there?

21 A. Yes.

22 Q. Was that earnings announcement a positive one?

23 A. Yes, I believe it was.

24 Q. The day before that earnings announcement on May 8, what  
25 did Mr. Walters do?

H3K3WAL6

Carocci - direct

1 A. He purchased 803,000 shares of Dean Foods stock.

2 Q. What happened on May 9?

3 A. The stock price increases and Mr. Walters buys additional  
4 shares.

5 Q. Moving ahead to July, what does the stock price do in the  
6 early half of July where the pointer is?

7 A. It declines.

8 Q. During that decline, what does Mr. Walters do?

9 A. He's purchasing as represented by the green columns  
10 counting from the dates below.

11 Q. Sort of the middle of the page we had Q2 earnings and  
12 spinoff announcement August 7, 2012. Do you see that?

13 A. Yes.

14 Q. What was that?

15 A. That was the quarter -- the second quarter earnings and the  
16 announcement of the spinoff of WhiteWave.

17 Q. What did the stock price do in the trading day after that  
18 announcement?

19 A. Right. This announcement was made after the close of  
20 trading and the stock price increased substantially or sharply  
21 after that announcement.

22 Q. Then after it reaches its peak there, what happened over  
23 the next few days to the stock price?

24 A. It declines somewhat.

25 Q. After it declines in to here, what did Mr. Walters do?

H3K3WAL6

Carocci - direct

1 A. He purchased additional shares.

2 Q. Then if we move ahead to September, what did Mr. Walters do  
3 in September of 2012 with regard to Dean Foods stock?

4 A. He purchased more shares as represented by the green  
5 columns.

6 Q. Then finally in early to mid October, what did he do?

7 A. Purchases additional shares.

8 Q. Finally, at the top you have a pink box that says WhiteWave  
9 IPO announcement October 17, 2012. What was that announcement?

10 A. It was the announcement of the IPO, of the initial public  
11 offering for WhiteWave.

12 Q. What did the stock do after that announcement?

13 A. It increases from, you know, approximately \$15 a share to I  
14 believe close to 18, \$19 per share.

15 Q. Toward the end of this chart, the end of October, does the  
16 stock price settle back down a little?

17 A. Yes.

18 Q. If we can go to Government Exhibit 2011. Zooming in a  
19 little bit on a narrower time frame. What is this chart?

20 A. It's Mr. Walters' trading activity from July 1st through  
21 August 15 of 2012. Another subsection.

22 Q. At the beginning of July, approximately what was the stock  
23 price for Dean Foods?

24 A. Approximately \$17 per share, it looks like.

25 Q. On July 20 in the middle of these purchases, where was the

H3K3WAL6

Carocci - direct

1 stock price at this point?

2 A. It looks like it declines to approximately \$12 per share.

3 Q. Then for the remainder of July, where does the stock  
4 remain?

5 A. It looks like it trades in that \$12 range.

6 Q. On the left side on July 13, what did Mr. Walters do?

7 A. He purchases over 750,000 shares of stock.

8 Q. What was the total percentage of the total market volume of  
9 that purchase?

10 A. 10 percent.

11 Q. Was that the largest purchase of that day?

12 A. Yes.

13 Q. On the 17th what did Mr. Walters do?

14 A. He purchases approximately 800,000 shares of stock.

15 Q. On the 18th?

16 A. The 18th he purchases additional shares of stock, I believe  
17 a hundred -- 125,000 shares I believe.

18 Q. Combined between the 17th and the 18th, how much did he  
19 purchase?

20 A. One million shares.

21 Q. Then moving ahead to July 23, what did he do on that day?

22 A. He purchased 525,000 shares of stock.

23 Q. What percentage of the total market volume was that?

24 A. That was 5 percent, and this was another date in which we  
25 aggregated the Nature Development account and The Walters Group

H3K3WAL6

Carocci - direct

1 account. There are 425,000 shares sold out of the -- I'm  
2 sorry, purchased out of The Walters Group account, and 100,000  
3 shares purchased in the Nature Development account. The  
4 425,000 purchased out of The Walters Group account represented  
5 the largest purchase transaction on that date.

6 Q. Then what did he do on July 24?

7 A. On July 24, he purchased additional shares.

8 Q. Then finally July 31, 2012, what did he do on that date?

9 A. He purchased approximately 100,000 shares of stock.

10 Q. Then combined with the 1.2 million shares of stock that he  
11 purchased on May 8 and 9th, with the 100,000 shares purchased  
12 on July 31, 2012, how many shares of Dean Foods stock did  
13 Mr. Walters own in total at that point? You can approximate  
14 it.

15 A. I thought it was approximately -- approximately three  
16 million shares of stock, 2.8 million, three million shares of  
17 stock.

18 Q. That's what he buys in July, is that right?

19 A. Correct. I believe he buys 2.8 million shares in July.

20 Q. Added together with the 1.2 million in May, how much is  
21 that?

22 A. That would be four million shares.

23 Q. Then you see the announcement, the spinoff announcement on  
24 August 7, is that right?

25 A. Yes.

H3K3WAL6

Carocci - direct

1 Q. Then this reflects, this blue line reflects the jump in the  
2 price at that point?

3 A. Correct.

4 Q. How much does he buy in total on August 10 and August 13,  
5 2012?

6 A. 250,000 shares each day for a total of 500,000.

7 Q. If we can go to Government Exhibit 2012, please. What does  
8 this chart reflect?

9 A. Mr. Walters' holdings and the Dean Foods stock price for  
10 the year 2013.

11 Q. We see here in the middle of the page a pretty significant  
12 drop in the stock price. What happens then?

13 A. Now is the distribution of WhiteWave. So, the value of  
14 Dean Foods is less because the WhiteWave assets are no longer  
15 part of Dean Foods, and the stock price is reflecting that.  
16 That decrease in assets from the Dean Foods --

17 Q. Did Dean Foods distribute its WhiteWave shares to its  
18 shareholders?

19 A. Correct.

20 Q. Those trades were traded separately under the WhiteWave  
21 symbol?

22 A. Yeah, it was May 23 I believe, 2013, yes.

23 Q. Then there is a big jump in August in the stock price.  
24 What is that?

25 A. Dean Foods executed a one-for-two reverse stock split.

H3K3WAL6

Carocci - direct

1 Q. What is that?

2 A. Well, a reverse stock split is, in this case, for every two  
3 shares of Dean Foods shareholders like Mr. Walters held, after  
4 the reverse stock split they only held one share. So the  
5 number of shares that they held or owned was cut in half. But,  
6 however, the stock price approximately doubles, because the  
7 number of outstanding shares have been cut, so, the value of  
8 the one share should still be kind of equal to the two shares,  
9 and the value of the holdings should be approximately the same  
10 as of the reverse stock split. There is just less outstanding  
11 shares, and the shareholder would own less shares.

12 Q. So, essentially the shares are cut in half, and the value  
13 of the stock is doubled?

14 A. Right. Essentially, yes.

15 Q. What does Mr. Walters do -- let's start here at the top.  
16 How much of Dean Foods stock did he own entering the year 2013?

17 A. Approximately 5.4 million shares.

18 Q. By the end of August, before this reverse stock split, how  
19 much Dean Foods stock did Mr. Walters own?

20 A. Looks like approximately 2.5 million.

21 Q. I'm sorry. I'm looking at the bottom level here.

22 A. Oh, I'm sorry. Looks like then it's just the 58,900 shares  
23 in that JPMorgan account that I spoke about earlier.

24 Q. Did the trading records that you reviewed reflect what  
25 happened -- well.

H3K3WAL6

Carocci - direct

1 Did the trading records that you reviewed reflect that  
2 Mr. Walters received WhiteWave stock in May of 2013?

3 A. Yes, I saw that in the account, yes, the account  
4 statements.

5 Q. What did he do with his WhiteWave stock in the account  
6 statements?

7 A. He appears to have sold all of it in July and August of  
8 2013.

9 Q. So by the end of August, he's completely out of his Dean  
10 Foods and WhiteWave stock?

11 A. Yes.

12 Q. If we can move to Government Exhibit 2013, please. What is  
13 this chart?

14 A. This is Mr. Walters' trading activity, the purchases and  
15 sales -- well here, here it's just sales for 2013. There are  
16 no purchases.

17 Q. What did he do on February 1st, 2013?

18 A. He sold one million shares of the Dean Foods stock.

19 Q. On February 13, 2013, what happened?

20 A. There was an earnings announcement and the stock price  
21 declined sharply after that earnings announcement.

22 Q. Then, the two pink boxes, do those reflect the distribution  
23 of WhiteWave shares that you referenced before as well as the  
24 reverse stock split?

25 A. Yes.



H3K3WAL6

Carocci - direct

1 Q. What is the black dotted line that you included in here?

2 A. That was just to give an idea of the stock price kind of  
3 unadjusted for the stock split. It's roughly half of the blue  
4 line, which is the actual closing price. This was just to give  
5 an idea of what that unadjusted price may look like.

6 THE COURT: You mean if there had not been a reverse  
7 stock split?

8 THE WITNESS: That's correct, your Honor.

9 THE COURT: Thank you.

10 Q. Is this an approximation, this black dotted line?

11 A. The black dotted line is an approximation.

12 Q. If we can finally go to Government Exhibit 2014. What is  
13 this document?

14 A. That's Mr. Walters' trading activity from September through  
15 October 2014 but really for all of 2014. Because all the  
16 purchases at the bottom and the two sales at the bottom were  
17 all of the trading activity for the calendar year 2013.

18 Q. What is the black dotted line here?

19 A. Again that's the unadjusted stock price, as your Honor  
20 said, if the reverse stock split did not occur.

21 Q. This is how you might be able to compare the stock price  
22 from 2014 to 2012 or 2010?

23 A. Yeah, from a dollar level, yes.

24 Q. Was there any earnings announcement during the time period  
25 that Mr. Walters owned Dean Foods stock beginning in early

H3K3WAL6

Carocci - cross

1 September before he sold in late October?

2 A. No.

3 Q. Did Mr. Walters make any trades in Dean Foods stock between  
4 August of 2013 and September of 2014?

5 A. No.

6 MR. GOLDMAN: One moment, your Honor. No further  
7 questions.

8 THE COURT: All right. You may cross-examine.

9 MR. SCHOEMAN: Thank you, your Honor.

10 CROSS-EXAMINATION

11 BY MR. SCHOEMAN:

12 Q. Good afternoon, Mr. Carocci.

13 A. Good afternoon.

14 Q. I'm Paul Schoeman, I represent Mr. Walters.

15 Mr. Carocci, you work for the criminal prosecution  
16 assistance group, is that right?

17 A. Yes.

18 Q. And the acronym is CPAG, right?

19 A. Yes.

20 Q. And the P is prosecution?

21 A. Yes.

22 Q. FINRA doesn't have a criminal defense assistance group?

23 A. Correct.

24 Q. So no CDAG?

25 A. Correct.

H3K3WAL6

Carocci - cross

1 Q. Not even a neutral assistance group?

2 A. Well, what would that be called, CNAG?

3 Q. No one would want to work there.

4 A. You're right.

5 Q. You testify for the prosecution. That's what you do,  
6 right?

7 A. Yes.

8 Q. That's what your group does.

9 A. Yes.

10 Q. And you've done it many times?

11 A. Yes.

12 Q. Different courts all over the country.

13 A. Yes.

14 Q. And you work closely with prosecutors, including  
15 prosecutors in this district?

16 A. Yes, I do.

17 Q. And CPAG is part of your organization FINRA, is that right?

18 A. Yes, it is.

19 Q. And FINRA is a very big organization, isn't it?

20 A. I think we have approximately 3,000 employees.

21 Q. About 3,600, is that right?

22 A. I guess so, I guess so. I'll take your word for it. I  
23 haven't looked lately, to be honest with you.

24 Q. It's got a lot of resources, is that right?

25 A. Well, we're funded, as I said, by our members. So, you

H3K3WAL6

Carocci - cross

1 know, we have to, you know, live within that budget. That  
2 funding.

3 Q. But the assets of FINRA are about \$2.3 billion, is that  
4 right?

5 A. I'll take your word for it. I haven't looked at that  
6 lately.

7 Q. Let me put on the screen for you what's been marked as  
8 Defense Exhibit 5249 for identification. Just show you the  
9 first page. You see what that is. And just real quickly,  
10 we'll turn to page nine of this document. And just look for  
11 yourself at the first paragraph.

12 A. Read it to myself?

13 Q. Just to yourself. The question is does that refresh your  
14 memory that FINRA has about \$2.3 billion in total assets?

15 A. Does it state what year it's from?

16 MR. SCHOEMAN: Can you show the cover again.

17 A. Okay. Yeah. 2015. Yes.

18 Q. So, FINRA, fair to say, is a multibillion dollar  
19 organization.

20 A. With assets. Those are our assets.

21 Q. It's got about a billion dollars of annual revenues?

22 A. I don't know. I haven't looked at the financial statements  
23 in a long time.

24 MR. SCHOEMAN: Back at Defense Exhibit 5249 and let me  
25 show you, it's page 14, just so that Mr. Carocci can see.

H3K3WAL6

Carocci - cross

1 Q. Look at the top line and ask you if that refreshes your  
2 memory that FINRA makes about a billion dollars a year in  
3 revenues?

4 A. For those two years, that appears to be the case.

5 MR. GOLDMAN: Your Honor, could we clarify whether his  
6 recollection is actually being refreshed or if he's reading the  
7 document.

8 THE WITNESS: I'm reading the document. I haven't  
9 looked at our financial statements in years.

10 THE COURT: Okay. So, if the document goes into  
11 evidence, anyone can read the document. Let's find out what  
12 the question is he's asking.

13 Are you asking what the witness knows or what the  
14 document says?

15 MR. SCHOEMAN: I'm asking whether it refreshes his  
16 recollection.

17 THE COURT: Now, you looked at the document. Now look  
18 away. Do you have a new and refreshed recollection?

19 THE WITNESS: I have a new and refreshed recollection.

20 THE COURT: That you independently recall apart from  
21 the document?

22 THE WITNESS: Yes.

23 THE COURT: Okay. You can tell the jury what that is.

24 Q. So what is your refreshed recollection about --

25 THE COURT: And don't look at the document.

H3K3WAL6

Carocci - cross

1 THE WITNESS: Sorry.

2 THE COURT: No, listen. Do you understand? So in  
3 other words, I used this analogy before. There could be  
4 somebody who was not around in 1986, who didn't know that the  
5 Mets won the World Series. Okay. And maybe they have a brain  
6 lapse or a memory lapse. And they see the cover of Sports  
7 Illustrated, and there it shows the Mets winning the World  
8 Series in 1986.

9 Two things are possible. One is they say that look  
10 likes a real cover of Sports Illustrated, and if they say it,  
11 it must be true. Which is not refreshing your recollection.  
12 And the other is maybe you remember that someone in your family  
13 was born that year, you remember being at the party for the  
14 Christening when this all happened, and it genuinely refreshes  
15 your recollection.

16 The question is, having looked at the document, do you  
17 now have a refreshed recollection? Not are you capable of  
18 reading the document.

19 THE WITNESS: Okay.

20 THE COURT: Do you understand the question?

21 THE WITNESS: I think I do now.

22 THE COURT: Now look away from the document. And what  
23 is your refreshed recollection?

24 THE WITNESS: It's not, I don't remember focusing in  
25 on numbers like this whenever I've looked at it, and I haven't

H3K3WAL6

Carocci - cross

1 looked at it in years. These numbers seem foreign. Not  
2 foreign to me, but they're not refreshing a recollection. I  
3 don't recollect numbers like this.

4 Q. Mr. Carocci, I'm just asking, FINRA is a big organization,  
5 right?

6 A. Yes.

7 Q. It's got about 3,500 or so employees?

8 A. Yes.

9 Q. And it's got hundreds of millions of dollars of assets?

10 A. Yes.

11 Q. And hundreds of millions of dollars of revenue, typically?

12 A. Yes.

13 Q. And FINRA makes your services available to the government  
14 for free, is that right?

15 A. Yes, that's correct.

16 Q. You're not charging the government for your time?

17 A. No.

18 Q. FINRA's resources are available to the government when they  
19 want them?

20 A. They reimburse us on travel expenses. They're available  
21 when we agree, when we agree to provide assistance.

22 Q. Right. But you agreed in this case?

23 A. I did, yes.

24 Q. And FINRA, you said, is a private organization. But it's  
25 what's called a self-regulatory organization or SRO. Is that

H3K3WAL6

Carocci - cross

1 right?

2 A. Yes.

3 Q. It is a creature of the federal securities statutes, an  
4 SRO?

5 A. Yes.

6 Q. It's supervised, FINRA, your organization, is supervised by  
7 the Securities and Exchange Commission?

8 A. Correct, they approve our rules and regulations that we  
9 apply to the industry.

10 Q. The Securities and Exchange Commission is an agency of the  
11 federal government that administers the securities laws?

12 A. Yes.

13 Q. And you often work closely with that agency of the federal  
14 government and the federal criminal prosecutors, right?

15 A. I don't, for the criminal prosecution assistance group, I  
16 do not work with the SEC.

17 Q. But, for example, you testified earlier they provide you  
18 with the blue sheet data, right?

19 A. They provide it to the U.S. attorney's office, and the U.S.  
20 attorney's office provided it to me. I didn't get it directly  
21 from them.

22 Q. But the SEC is part of the same federal government as the  
23 prosecutors in this case, right?

24 A. Yes.

25 Q. And the SEC is the overseer of FINRA under the securities



H3K3WAL6

Carocci - cross

1 law, right?

2 A. Yes.

3 Q. And in fact recently, the SEC formed something called the  
4 FINRA and Securities Industry Oversight Group to monitor FINRA.  
5 That was something they did last year?

6 A. I'm not familiar with that.

7 Q. You do know there is a whole bunch of people at the SEC  
8 whose job it is to monitor what FINRA is doing?

9 A. I don't know how many people at the SEC monitor FINRA.

10 Q. But you know that the SEC oversees and has oversight  
11 responsibility for FINRA?

12 A. Correct, yes.

13 Q. Then in turn, based on the authority that's given to FINRA  
14 by the SEC, FINRA has authority over broker-dealers, right?

15 A. Yes.

16 Q. So, broker-dealers have to get licensed by FINRA?

17 A. Registration process, correct.

18 Q. And you do inspections of them?

19 A. Yes.

20 Q. And you can make requests for information from them?

21 A. Yeah, I can't as a member of CPAG, but the FINRA  
22 enforcement and the kind of the civil regulation can make  
23 requests of them. I do not as a member of CPAG.

24 Q. But FINRA can ask broker-dealers like Barclays or Merrill  
25 Lynch or Wachovia for information, right?

H3K3WAL6

Carocci - cross

1 A. They can, yes.

2 Q. And they have the ability to impose discipline on  
3 broker-dealers and brokers if they don't comply with FINRA's  
4 rules and regulations, right?

5 A. Yes.

6 Q. You mentioned in your direct testimony that FINRA has an  
7 office that does something called market surveillance. Is it  
8 called the office of fraud detection and market intelligence?

9 A. Yes.

10 Q. And that's another part of the FINRA organization where you  
11 work?

12 A. Yeah. I'm walled off from all of the FINRA civil  
13 regulatory departments. Because I only work on the criminal  
14 cases, my group only works in criminal cases, so I really don't  
15 know what -- I know the department exists, I know generally  
16 what they do. But I don't know anything else.

17 Q. It's headed for a long time by a fellow named Cameron  
18 Funkhouser?

19 A. Yeah, yes.

20 Q. He's been at FINRA even longer than you have, right?

21 A. Probably. Probably, but I don't know for sure how many  
22 years he's been there.

23 Q. So he's the head of the office of fraud detection and  
24 market intelligence, right?

25 A. Yes, he is.

H3K3WAL6

Carocci - cross

1 Q. And they do market surveillance on the trading of stocks to  
2 try to detect things that may be of interest for investigation,  
3 is that right?

4 A. Yes.

5 Q. And as part of that, they have a computer program called  
6 the Securities Observation News Analysis and Regulation program  
7 or otherwise known as SONAR?

8 A. I've heard of that, yes.

9 Q. That's in fact, going back even before FINRA, FINRA used to  
10 be or part of it used to be part of the NASD, right?

11 A. Correct.

12 Q. And before the NASD and the New York Stock Exchange got  
13 together to create FINRA, CPAG was part of the NASD, right?

14 A. Yes.

15 Q. And even before the SONAR computer system, going way back,  
16 the NASD did computer-based market surveillance to detect  
17 spikes in price and volume, right?

18 A. I -- I don't know. Because I've never really worked in  
19 that part of FINRA, and I've been walled off as a member of  
20 CPAG for most of the past 14 years.

21 THE COURT: If you don't know, the answer is you don't  
22 know.

23 THE WITNESS: Okay.

24 THE COURT: You don't have to give an explanation why  
25 it is that you don't know something.

H3K3WAL6

Carocci - cross

1 THE WITNESS: Okay.

2 THE COURT: Next question.

3 Q. But you know that the office exists, the office of -- I'll  
4 get the name right. Fraud detection and market intelligence.

5 A. Yes.

6 Q. Headed by Cameron Funkhouser?

7 A. Yes.

8 Q. It is not a secret that FINRA does market surveillance,  
9 right?

10 THE COURT: Well, do you know whether it is a secret  
11 that FINRA does market surveillance? That's the question.

12 THE WITNESS: I don't believe it is a secret.

13 THE COURT: Next question.

14 Q. And in fact, Mr. Funkhouser is often quoted in newspapers  
15 talking about the great work that his office does.

16 MR. GOLDMAN: Objection, your Honor.

17 THE COURT: Wait a second. Do you know whether  
18 Mr. Funkhouser is frequently quoted in newspapers?

19 THE WITNESS: I don't.

20 THE COURT: Then you can answer the question.

21 A. No.

22 THE COURT: Okay. What is the objection?

23 MR. GOLDMAN: It's eliciting hearsay, your Honor.

24 THE COURT: He doesn't know. So it's moot. Go ahead,  
25 next question.

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Carocci - cross

1 Q. Well, let me just show you while we're at it Defense  
2 Exhibit 5255 for identification. And just look at that for  
3 yourself. And at the bottom of the --

4 MR. GOLDMAN: Your Honor, he says he doesn't know, not  
5 that he doesn't remember.

6 THE COURT: Absolutely. Next question.

7 MR. SCHOEMAN: All right.

8 Q. Let me just ask this question. Are you familiar at all  
9 with Cameron Funkhouser's public statements about the work of  
10 his office at FINRA?

11 A. No, not really.

12 Q. Okay. Let's look at your charts. Let's put up what's  
13 already in evidence as Government Exhibit 2000.

14 So first, this is one of the charts that you created  
15 as part of your criminal prosecution assistance in this case?

16 A. Yes.

17 Q. You testified on direct examination that there are  
18 basically two different things going on. One is this shows the  
19 stock price, and the other is that it shows the number of  
20 shares that Mr. Walters had. Is that right?

21 A. Yes.

22 Q. So, the scale on the left side is for Mr. Walters'  
23 holdings, and the scale on the right side is for the stock  
24 price, right?

25 A. Yes.

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Carocci - cross

1 Q. But, just to be clear, the two scales are scales that you  
2 chose just so you could fit everything on the chart, right?

3 A. Right. Well, one is in dollars and one is numbers of  
4 shares, so yes.

5 Q. But there is no significance, for example, to the fact that  
6 in the middle of the chart the red line almost touches the blue  
7 line.

8 A. I don't understand the "significance."

9 MR. SCHOEMAN: Let me show just the witness for  
10 demonstrative purposes what we've marked as Defense Exhibit 1.

11 Q. And let me ask you, just as an illustration, is this  
12 basically the same data where the scale on the left goes from  
13 zero to 15 million instead of zero to 8 million.

14 MR. SCHOEMAN: If we can put them up side by side for  
15 the witness of Government Exhibit 2000 and Defense Exhibit 1.

16 Q. And so the question is, is this basically the same data,  
17 just a different scale, for Mr. Walters' holdings?

18 MR. GOLDMAN: Your Honor, we object. The witness has  
19 not seen Defense Exhibit 1 ever. How could he know whether it  
20 is the same data?

21 MR. SCHOEMAN: I'm just offering it as an aid to the  
22 jury to understand scale, and I don't intend to offer it in  
23 evidence. But just to show it as a demonstration of what the  
24 effect of scale would be on the chart.

25 So the question is, does this appear to the witness to

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Carocci - cross

1 be a representation of the same data but with a different  
2 scale.

3 THE COURT: Do you know?

4 THE WITNESS: No. I mean, there is a different scale  
5 on the side. I don't know about the data.

6 Q. I'm just asking you to compare Government Exhibit 2000,  
7 which is your chart, and Defense Exhibit 1, and ask you  
8 whether, just whether it appears to you that the red line in  
9 Defense Exhibit 1 is the same data in Government Exhibit 2000,  
10 but just with a different scale.

11 THE COURT: Well, when you say appear, you want to  
12 know if it is the same data, not if it appears to be the same  
13 data, but whether it is the same data.

14 MR. SCHOEMAN: What I'm really asking, your Honor, is  
15 whether it would assist in showing the jury the effect of scale  
16 in portraying data as a demonstrative.

17 THE COURT: But the foundational question is, is it  
18 the same data. Isn't it? If it's not the same data, then it  
19 can't assist. Correct?

20 MR. SCHOEMAN: So my position, your Honor, is if it  
21 looks close enough to assist in illustrating the point, it is  
22 admissible as a demonstrative for the jury.

23 THE COURT: You can definitely put in all the exhibits  
24 you want. Right now, you have a witness on the stand and  
25 you're trying to get this witness to adopt your exhibit. So

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Carocci - cross

1 put the question to the witness. And I don't think it is a  
2 question of appearance. I think it is a question of whether it  
3 is in fact the same. Because I could tell you something  
4 appears offhand to look right, but if I don't know whether it  
5 does or it doesn't. My answer could be highly misleading.

6 Q. I'm going to ask the witness to take a few seconds, look at  
7 the two pictures, and ask you whether looking at the pictures,  
8 the data is the same.

9 THE COURT: Okay.

10 A. I don't know. I didn't create the exhibit that you've put  
11 up. So I don't know. I created the exhibit that I testified  
12 to on direct with data that I had. But I didn't create this  
13 other exhibit.

14 Q. So you can't answer my question?

15 A. Can you rephrase your question?

16 Q. I'm going to withdraw it.

17 I want to go back to Government Exhibit 2000. Can we  
18 put that on the screen. Do you see, sir, how the red line in  
19 Government Exhibit 2000 in the middle of the page goes halfway  
20 up the page, right?

21 MR. SCHOEMAN: Can we publish that to the jury.

22 A. Yes.

23 Q. You see how in the middle, it goes halfway up the page.  
24 You see that?

25 A. Yes.



H3K3WAL6

Carocci - cross

1 Q. All right. But that's because the scale that you did goes  
2 from zero to 8,000, right? So the 4,000 is in the middle.

3 A. Four million is in the middle.

4 Q. I'm sorry. Four million is in the middle, right?

5 A. Four million is in the middle of the scale between zero and  
6 eight million.

7 Q. If the scale went from zero to say 16 million, then instead  
8 of being in the middle, it would be a quarter of the way up,  
9 right?

10 A. Well, four million is a quarter of 16.

11 Q. My question really, sir, is the -- the two lines, the blue  
12 line and the red line, sir, have different scales. One is on  
13 the left and one is on the right, is that right?

14 A. Yes.

15 Q. And there is no inherent relationship between how you did  
16 the scale on the left and how you did the scale on the right,  
17 right?

18 A. Yeah, no, they show two different things.

19 Q. Right. So the fact that, for example, the red line in the  
20 middle goes halfway up the page and almost touches the blue  
21 line isn't a significant thing, right?

22 A. I would agree.

23 Q. Because you could have drawn the same picture with a  
24 different scale, and the red line would only go a quarter up  
25 the page.

H3K3WAL6

Carocci - cross

1 A. Are we talking about the 16 million scale?

2 Q. Yeah. Just, for example, I'm trying to ask you to explain  
3 the fact that you're showing two different things on this  
4 chart, and one has the scale on the left in millions and one  
5 has the scale in the right in dollars, and you put them on the  
6 same page.

7 A. Right. They are on the same page, yes.

8 Q. Yeah. If you chose a different scale, it would look very  
9 different, right?

10 A. It would look different.

11 Q. Because if you put four million at the top of the page,  
12 then the part in the middle would go all the way to the top,  
13 right?

14 A. If four million was at the top of the scale?

15 Q. Yes, sir.

16 A. Yes.

17 Q. Okay. Just to be clear, the blue line that you show for  
18 stock price, that's closing price, is that right?

19 A. Yes.

20 Q. And the closing price -- stock trades during the day in a  
21 range, is that right?

22 A. Yes.

23 Q. So the closing price isn't necessarily where it traded  
24 during the day, it is just the last quoted price of the day.

25 A. Yes.

H3K3WAL6

Carocci - cross

1 Q. Your chart would be sort of more confusing and messier if  
2 you put opening and closing and the range on it.

3 A. Probably.

4 Q. And let's look at Government Exhibit 2001, please. This is  
5 a chart that you did for the 2008 time period, is that right?

6 A. Yes.

7 Q. You recall that 2008 was the financial crisis?

8 A. Yeah, yeah, I am aware there was a financial crisis in  
9 2008.

10 Q. The worst recession since the Great Depression was  
11 basically in 2008, right?

12 A. Yeah.

13 Q. So there was a lot going on in the financial markets in  
14 2008 that you did not choose to put on the chart.

15 A. Well, I mean, the chart just relates to Dean Foods so  
16 that's right.

17 Q. But there are other things going on in the world other than  
18 the announcements, for example, relating to Dean Foods that  
19 might have had an impact on the stock price?

20 A. Correct.

21 Q. Right. So you are not saying that these announcements are  
22 the only announcements that have any impact on the stock price.

23 A. Correct.

24 Q. There is a lot going on in the world, particularly in the  
25 2008 time period.

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Carocci - cross

1 A. Yes.

2 Q. And for example, the earnings announcement that you've  
3 identified on November 4, 2008, do you remember what else  
4 happened on November 4, 2008?

5 A. I don't.

6 Q. Okay. If I told you it was the second Tuesday of a  
7 November in a presidential election year, would that jog your  
8 memory?

9 A. The second Tuesday in November was November --

10 Q. The first Tuesday in November.

11 A. It would have been Election Day.

12 Q. Yeah. And so do you remember that, for example, on the  
13 same day as the earnings announcement, that was also the  
14 election of Barack Obama?

15 A. That's correct.

16 Q. So again, lots of things going on in the world not depicted  
17 on the chart, is that right?

18 A. The presidential election is not depicted on the chart.

19 Q. Okay. And a lot of other things are also going on in the  
20 world not depicted on the chart?

21 A. I guess the chart's limited in that way.

22 Q. But you show earnings announcements of Dean Foods. That's  
23 a kind of public information, right?

24 A. That's public information, yes.

25 Q. It is not the only public information that might be

H3K3WAL6

Carocci - cross

1 relevant to an investor, that's the point. Right?

2 A. Yes.

3 Q. Okay. So then let's look at Government Exhibit 2002 also  
4 in evidence. And in this chart, you show Mr. Walters'  
5 purchases in green, sales in red, the price in blue, and you  
6 also looked at volume as a percentage of total market volume,  
7 right?

8 A. Yes.

9 Q. So those are the things that you chose to depict on the  
10 chart?

11 A. Yes.

12 Q. Did the government ask you to put those things on the  
13 chart?

14 A. It was collaboration, but yes, I mean, they wanted them on  
15 the chart.

16 Q. So in collaboration with the government, you selected the  
17 data or how to portray this data on the chart?

18 A. Yes.

19 Q. Also which data to put on?

20 A. Right, right.

21 Q. If, for example, if we go back to Government Exhibit 2001.  
22 I think you testified that, for example, so the green bars are  
23 Mr. Walters' purchases, right? Is that right?

24 A. Yes.

25 Q. And in the chart we just looked at before, you did analysis

H3K3WAL6

Carocci - cross

1 of what the volume was doing in the market, right?

2 A. Yes.

3 Q. But you see how when Mr. Walters is buying here, here, and  
4 here, the stock price is falling?

5 A. Yeah, that appears, yes.

6 Q. So, and you had data showing not just the volume in the  
7 market, but obviously the price of the stock during the time  
8 when Mr. Walters was buying. You have that data.

9 A. The volume data and the stock price data, yes.

10 Q. And you made a chart that showed the indication --  
11 information about Mr. Walters' percentage of the total market  
12 volume. You made that chart. That's the one we -- 2002 we  
13 just looked at.

14 A. Right. For select dates, yes.

15 Q. Right. You selected the dates to put that data on the  
16 chart. But for example, you could have done a chart that  
17 indicated how much the price was dropping each time Mr. Walters  
18 was buying stock. You could have done a chart of that.

19 A. I'm not sure I understand.

20 Q. Well, for example, this first time that you depict  
21 Mr. Walters buying stock, you could have analyzed that data,  
22 and if you wanted to, done calculations showing how far the  
23 stock had come down when Mr. Walters was buying.

24 Sorry, that's messy.

25 You could have done a calculation like that, but you

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Carocci - cross

1 didn't put it on your chart.

2 A. Well, I think the stock -- the chart does show how much the  
3 price came down roughly from that area you just circled, from  
4 \$26 down to \$19, so I think it does show the stock price  
5 decline.

6 Q. On Government Exhibit 2002, you did a calculation of the  
7 percentage of the volume corresponding to Mr. Walters based on  
8 your conversations with the government about putting that on  
9 the chart, right?

10 A. In 2002, yes.

11 Q. Sorry. In Government Exhibit 2002.

12 A. Yes.

13 Q. But just saying there are other calculations related to  
14 Mr. Walters' buying that you chose not to put on the chart.

15 A. On the previous chart, 2001, yes.

16 Q. We'll go --

17 A. Yes, yes.

18 Q. You could have, based on the data you had, indicated how  
19 much the price had dropped each time Mr. Walters bought in the  
20 market, right?

21 A. Well, I think the stock price does indicate how much it  
22 dropped. But you're right, there was no percentage analysis on  
23 this chart.

24 Q. And you've heard the expression buy low and sell high?

25 A. I've heard the expression.

H3K3WAL6

Carocci - cross

1 Q. And you worked for a little while at Goldman Sachs, right?

2 A. Yes.

3 Q. You understand in the world of private investing, that's  
4 generally what people are trying to do, buy low and sell high?

5 A. I understand that.

6 Q. Another thing, just to be clear, the announcements that you  
7 put on the chart are announcements by Dean Foods the company,  
8 and I'm referring now to Government Exhibit 2002. I'm sorry, I  
9 was referring to 2001. 2002. Those are announcements from the  
10 company.

11 A. Yes.

12 Q. But you did not include on the chart every announcement  
13 that the company made during this time period.

14 A. Yes, correct, I think it is just the earnings announcement  
15 and the press release.

16 Q. But for example, an exhibit was marked earlier today in  
17 evidence, Defense Exhibit 2176.

18 Could we show that to the witness and it's in  
19 evidence.

20 You see, sir, this is a press release from Dean Foods  
21 on February 29, 2008. You see that?

22 A. Yes.

23 Q. And just going back to the previous chart. 2001. That  
24 February 29 announcement is not depicted on your chart.

25 A. Correct.



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Carocci - cross

1 Q. And if you were to depict it, it would be right about --  
2 well, the line is too thick, but it's right around here. Is  
3 that right, February 29?

4 A. That looks more like in March to me. But --

5 Q. A little bit to the left?

6 A. Yeah. It would be to the left.

7 Q. So but it's right after Mr. Walters was buying starting on  
8 February 25, you see that?

9 A. Right. Right. The press release was on the 29th and this  
10 was on the 25th.

11 Q. Right.

12 A. Right.

13 Q. So my point is there is a press release on the 29th,  
14 shortly after Mr. Walters started buying, but it is not  
15 depicted on your chart, is that right?

16 A. That's correct.

17 Q. And that announcement on February 29, actually following  
18 the announcement, the price of Dean Foods stock went down.

19 A. I -- it's tough to tell exactly what the 29th --

20 Q. So you would want to look at the data that you have in the  
21 spreadsheet, is that right?

22 A. Right.

23 Q. So if we could show, this is now in evidence by  
24 stipulation, government Exhibit 1739 for the February 2008 time  
25 period. Government Exhibit 1739. And you see that the column

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Carocci - cross

1 that says last price in the middle of your -- that's your  
2 spreadsheet, right?

3 A. It appears to be, yes.

4 Q. And you said that the announcement on the 29th is where --  
5 I think there is actually a time on the previous exhibit. But,  
6 those are generally in the morning, right?

7 A. Yeah, I believe that exhibit said it was at 7 a.m.

8 Q. So, the stock price closing price on the 29th is where the  
9 stock ended up on the day where the day started with that  
10 announcement, right?

11 A. Right.

12 Q. And you see that the stock price dropped from the previous  
13 day's close, which was 22.99, to 21.52?

14 A. Yeah that's a decrease.

15 Q. Of about a buck-fifty?

16 A. Yes.

17 Q. And just going back then to your chart, Government Exhibit  
18 2001, you would agree with me that Mr. Walters' buying, which  
19 started on February 25, 2008, was right before an announcement  
20 that actually caused the stock of Dean Foods to sink, isn't  
21 that right?

22 A. You're saying that the buying on the 25th was before the  
23 press release on the 29th, and there was a stock decrease from  
24 the 28th to the 29th.

25 Q. During the day on the 29th.

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Carocci - cross

1 A. Right. During the day on the 29th. Yes.

2 Q. So although it is not on the chart, Mr. Walters' buying was  
3 right before an announcement that caused the stock price to go  
4 down.

5 A. Yes.

6 Q. And so, that was not a great time to buy.

7 MR. GOLDMAN: Objection, your Honor.

8 THE COURT: Yes. Sustained.

9 Q. Well, the stock was worth less after he bought it than when  
10 he bought it, right?

11 A. Right, because the price declined, yes.

12 Q. Another thing that your chart, and we'll just use  
13 Government Exhibit 2002 as an example, it does not show any --  
14 I keep getting that wrong. Let's do 2001.

15 It shows announcements by the company, but it does not  
16 show, for example, any analyst reports.

17 A. That's right.

18 Q. Did you have access as a member of the criminal prosecution  
19 assistance group at FINRA to analyst reports?

20 A. I don't.

21 Q. But could you have requested them?

22 A. Sure. I guess.

23 Q. Okay. But no analyst reports on any of your charts?

24 A. That's correct.

25 Q. And no news articles about significant news in the economy?

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Carocci - cross

1 A. That's correct.

2 Q. And one of the things that you were doing with Mr. Goldman  
3 on direct examination is talking about whether the stock price  
4 went up or down after various purchases by Mr. Walters. You  
5 did some of that on direct examination?

6 A. Yes.

7 Q. You could have put on your charts if you wanted to, you  
8 could have identified which trades were winners and losers?

9 A. Yes.

10 Q. So for example, the very first trade that's listed in any  
11 of your exhibits, which is the first one, is February 25, 2008  
12 reflected on Government Exhibit 2001, that February 25 trade.

13 A. The first one is in early February.

14 Q. The first purchase, I'm sorry.

15 A. Oh, first purchase, okay.

16 Q. So, you see that it's kind of hard to see from your chart  
17 exactly how much Mr. Walters paid at the first green line. I  
18 don't know, maybe you can do it, but I can't.

19 A. Right.

20 MR. SCHOEMAN: So let's show the witness what's been  
21 entered into evidence by stipulation as Government Exhibit  
22 102-B. And I'm going to show him what it is. This is in  
23 evidence.

24 Q. You see that this is an account statement at Wachovia  
25 Securities for The Walters Group?

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Carocci - cross

1 A. Yes.

2 Q. Is this one of the account statements that you relied on in  
3 preparing your charts?

4 A. Yes.

5 Q. Let's turn to page 12 of 17 of this document. That's the  
6 one. Do you see on the 25th there is a purchase of Dean Foods?

7 A. Yes.

8 Q. You see that?

9 A. Hmm-hmm.

10 Q. And just so we can all see the price, the price is 24 and a  
11 penny, and change?

12 A. Yes.

13 Q. So that means that Mr. Walters bought 200,000 shares of  
14 Dean Foods and he paid a little over \$24?

15 A. Yes.

16 Q. And the total purchase price was 4,811,567.50?

17 A. Yes.

18 Q. The price there was \$24 and a little bit, right?

19 A. Right.

20 Q. Back to Government Exhibit 2001. Do you see that at the  
21 April 30, 2008 earnings announcement, the price does not reach  
22 \$24? Do you see that?

23 A. Yes.

24 Q. So, that Mr. Walters on February 25, the first purchase  
25 reflected on this chart, bought the stock for more than the

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Carocci - cross

1 stock was worth following the April 30, 2008 earnings  
2 announcement, right?

3 A. Well, again, it is the closing price. So again,  
4 Mr. Walters is buying interday. But it doesn't appear it  
5 closed above \$24 after the April 30, 2008 earnings  
6 announcement. It doesn't mean it didn't trade above \$24.

7 Q. Do you have any reason to believe that it did trade above  
8 \$24?

9 A. I didn't review that. We just went with the closing  
10 prices.

11 Q. Right. Let's go to Government Exhibit 1739 in evidence and  
12 I'll show you what your spreadsheet shows. And let's look at  
13 the April 30 time period. Do you see that the closing price on  
14 April 30 is substantially below \$24?

15 A. 36 cents below.

16 Q. Let me ask you this: Do you know whether it traded ever  
17 above \$24 on the 30th?

18 A. I don't know off the top of my head.

19 Q. If you had an exhibit that showed opening, high, low, and  
20 closing trading price, then you would know. You would know  
21 that, right?

22 A. Well, that would be on the exhibit, yeah.

23 Q. Right. Let me show you Defense Exhibit 2037.

24 (Continued on next page)

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Carocci - cross

1 Q. And let's just look at -- not for the jury, I'm sorry -- it  
2 is not in evidence -- just for the witness.

3 And let's look at on April 30th. And just look at the  
4 entry for April 30th, and I'm just going to ask you whether  
5 based on that you have any recollection that the stock did not  
6 trade at or above \$24?

7 THE COURT: Do you understand what is being asked of  
8 you?

9 THE WITNESS: Yes.

10 THE COURT: OK.

11 Q. I am just asking whether looking at that generates a  
12 recollection.

13 THE COURT: The question is whether you have a  
14 recollection after you look at this.

15 So look at this. Then turn away from the document and  
16 see whether you have a recollection.

17 MR. GOLDMAN: Your Honor, we'll stipulate to the fact  
18 that it never went above \$24 on that day.

19 THE COURT: All right.

20 MR. SCHOMAN: Take that down.

21 Q. Let's go back to Government Exhibit 2001. And you see that  
22 the blue line in the May time period does not go above \$24. Do  
23 you see that?

24 A. Yes.

25 Q. And in fact it doesn't go above \$24 until the August

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Carocci - cross

1 timeframe. Do you see that?

2 A. Yes.

3 Q. And just on your chart, you show the August 6, 2008,  
4 announcement. Do you see that?

5 A. Yes.

6 Q. And from where the arrow is pointing, it kind of looks,  
7 doesn't it, like the stock went up on August 6, 2008?

8 A. Yes. It looks like that, yes.

9 Q. Yeah. But let me show you what's in evidence, Government  
10 Exhibit 1739 for the August time period -- sorry, august 6th, a  
11 little above that -- in evidence.

12 And just looking at that, can you see that actually on  
13 August 6th, the closing price represents a decline from the  
14 previous day?

15 A. Right. I mean, you know, the arrow approximates the price  
16 on the blue line.

17 Q. Right. In fact, it is really, just looking at what's on  
18 the screen, Government Exhibit 1739, you can see that the day  
19 that the closing price actually goes above 24 is August 8th,  
20 two days after the announcement, right?

21 A. That is when it goes above 24, yes.

22 Q. So going back to Government Exhibit 2001, we're talking  
23 about this arrow here. The arrow for August 6th should really  
24 be pointing to a place where the stock went down, right?

25 THE COURT: All right. Think about the answer to that



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1 overnight. Ladies and gentlemen, I'm going to hold you in  
2 suspense on that answer.

3 And as always, have a pleasant evening. Do not  
4 discuss the case among yourselves or with anyone. We'll be  
5 back in action, be here a quarter to 10 tomorrow so we can have  
6 a good 10 o'clock start. And I am going to ask Juror No. 16 to  
7 remain behind, please.

8 (Continued on next page)

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(Jury not present except for Juror No. 16)

THE COURT: Just have a seat.

Please be seated. You may be seated.

So with the thanks of the Court, and with consent of the parties, you need not report and you should not report further. Although I'm going to direct that you not discuss the case with anyone until you receive a phone call from Flo Nacanthor, my deputy, and she will call you at the end of this case and let you know that all jurors have been discharged and you are relieved of your duty not to discuss the case.

JUROR NO. 16: Thank you.

THE COURT: I wish you the very best in the matters that you discussed with us in the letters, and I thank you for being with us to this point.

JUROR NO. 16: Very good. Thank you.

THE COURT: All right.

JUROR NO. 16: Thank you.

THE COURT: See you all tomorrow morning at a quarter to 10.

MR. GOLDMAN: Your Honor, I have a couple of things.

JUROR NO. 16: Am I good to go?

THE COURT: Yes. You are good to go. Thank you.

MR. BERKE: Your Honor, I was just going to raise a relatively minor matter.

MR. GOLDMAN: Sorry. Could we allow the witness to --

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1 THE COURT: Yes. Go.

2 THE WITNESS: Thanks.

3 (Witness not present)

4 MR. BERKE: Your Honor, you probably noticed that  
5 earlier today during the cross-examination of Mr. Engles I  
6 offered into evidence quite a number of documents that were  
7 marked for identification as government exhibits.

8 THE COURT: Yes.

9 MR. BERKE: What we did is we had produced to the  
10 government from our side a lot of press release company  
11 documents that the government had ended up marking as exhibits.  
12 To save everybody inconvenience, we tried to avoid, to the  
13 extent we knew they already marked it --

14 THE COURT: Double marked.

15 MR. BERKE: Exactly. I would just ask if your Honor  
16 would consider telling the jury at some point tomorrow that  
17 whether it is listed as a government exhibit or a defense  
18 exhibit, it is for identification purposes and either side is  
19 free to introduce it. I don't want to create a greater mystery  
20 about why we are doing it.

21 THE COURT: Great idea. Just remind me if I forget,  
22 but I will make a note to myself here.

23 MR. BERKE: Thank you, Judge.

24 THE COURT: Did you have something, Mr. Goldman?

25 MR. GOLDMAN: We do, your Honor.

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1           We expect that at the conclusion of Mr. Carocci's  
2 testimony tomorrow Tom Davis will testify, and there are a  
3 couple of outstanding issues that have been briefed to the  
4 Court that may come up during his testimony, and we were hoping  
5 to get some resolution so that we can properly prepare the  
6 witness, including any mention of the wiretap, mention of the  
7 leaks, the source of the articles in May and June of 2014, and  
8 then more recently, last night and this morning, the parties'  
9 briefing on the witness' memory.

10           THE COURT: Well, it seems to me the witness is not in  
11 a position to offer a diagnosis as to the cause of any memory  
12 loss. He can say, if it's the case, that I had a medical  
13 condition and a minor stroke. If that comes up in his answer  
14 and that's what he was told by the doctors, he can say he had a  
15 minor stroke. But he cannot sit on the stand and say, you see,  
16 I had a minor stroke, but the nature of the minor stroke was  
17 such that it temporarily dislodged my memory but then after a  
18 period of so many days my memory came back and this is a  
19 medically known condition. I've never heard of the condition  
20 myself, and certainly a lay witness is not going to be  
21 permitted to testify to that.

22           MS. CUCINELLA: Just to clarify, your Honor, that is  
23 not the testimony that we intend to elicit. The testimony that  
24 we intend to elicit, as described in our letter, is simply that  
25 he was recovering from the surgery when he began proffering

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1 with the government, and that when he started to prepare for  
2 his testimony he was no longer recovering and was feeling much  
3 healthier and that it was easier for him to remember. Nothing  
4 more than that. We will not get into causation or diagnosis of  
5 any kind.

6 THE COURT: Well, I think kept at that level and that  
7 he was recovered or he felt better at that time, that I don't  
8 think is medical testimony.

9 MS. CUCINELLA: We agree, your Honor.

10 MR. BERKE: Your Honor, if I may address that? I  
11 think what the government intends to do is certainly suggest to  
12 the jury through that testimony that his memory was failing at  
13 that time because of a stroke and it came back because he was  
14 feeling better. That's I believe the impression they want to  
15 leave. Again, your Honor, we believe that that is -- there is  
16 no medical basis.

17 Mr. Davis, we were told by the government, has not  
18 given any medical records to the government to support any of  
19 this, and we are left unable to cross-examine what we think is  
20 Mr. Davis' claim about how his memory was affected. We think  
21 the cases we cited are clear that he cannot in any way indicate  
22 that his memory or his ability to recall events or discuss  
23 events was impacted by a medical event.

24 THE COURT: I agree with you. I agree with both of  
25 you. And I don't think what I'm hearing that will come out of

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1 the mouth of the witness runs afoul of that.

2 MR. BERKE: I've heard this -- what I heard  
3 Ms. Cucinella saying is that he is going to say that he is  
4 better able to remember things now because he has recovered  
5 from the stroke.

6 MS. CUCINELLA: That's not what I said.

7 THE COURT: If that's what you said, that is not  
8 something he is going to be allowed to do.

9 MS. CUCINELLA: Yes.

10 THE COURT: All right. So I don't think there is much  
11 of a disagreement here. You're going to stand up and object if  
12 I hear anything that amounts to a medical explanation beyond  
13 the fact that, you know, why did you not tell the government  
14 this, that, or the other thing, which is a fair question. I  
15 assume you are going to ask it. And one of the answers could  
16 be because I'm a liar, or I wanted to conceal it? And if his  
17 answer is I was unwell that day, that's his answer. And he can  
18 give that as his answer.

19 What I'm not going to allow him to do is extend that  
20 to the point of a medical self-diagnosis. If it's his  
21 testimony that he had a stroke, that's fine. How did you feel  
22 on the day that you second proffered to the government? I felt  
23 much better that day. That's not going to run afoul of my  
24 ruling.

25 MR. BERKE: Your Honor, based on our discussions with

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1 Ms. Cucinella, I believe what he is going to say is --

2 THE COURT: Well, no, no, no, no, no, no, no. It is  
3 not based on your discussions with Ms. Cucinella. It is based  
4 on my ruling. So I don't think Ms. Cucinella is going to run  
5 afoul of my ruling. Even if in your discussion she planned to  
6 have this guy explain an elaborate medical condition, it not  
7 going to happen.

8 MR. BERKE: Your Honor, can I make two requests?

9 THE COURT: Yes.

10 MR. BERKE: One, that whatever he is going to say,  
11 could we first do it outside the presence of the jury?

12 THE COURT: No. No. I will instruct the jury as  
13 appropriate.

14 MR. BERKE: Two, could I make a request that the  
15 government request his medical records so they be produced in  
16 order to be able to evaluate his claims about his condition?

17 MS. CUCINELLA: We don't intend to make any claims  
18 about his condition. He is going to testify about the fact  
19 that he had a massive surgery around Thanksgiving in 2015 and  
20 prior to that he had a gray out, that he was recovering from  
21 that surgery at the time --

22 THE COURT: What is a gray out?

23 MS. CUCINELLA: It was an incident where he lost  
24 consciousness while he was in a public place, and as a result  
25 of that he went to the doctor and learned that he had a carotid

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1 artery and then after that he had surgery. After that, all we  
2 are eliciting is the fact that he had this surgery and was  
3 recovering during the period where he initially proffered with  
4 us. We are not connecting anything else or making any other  
5 kind of diagnosis here.

6 MR. BERKE: Your Honor, if I understand, he had a  
7 blockage that was unblocked. It is a relatively minor surgery,  
8 as I understand it, from what I've seen in the 3500 material.  
9 I have a lot of information from the 3500 material.

10 For him to now claim that the reason why his story  
11 changed dramatically is because somehow he was unwell and I am  
12 not going to be in a position to cross-examine him on how  
13 unwell he was and then he recovered and was better able to  
14 remember things, I don't think that is fair to Mr. Walters,  
15 your Honor, and I think the case law says that's what they  
16 can't do.

17 THE COURT: Well, this is where I do agree with you.  
18 I'm going to listen to the testimony. I'm going to see what's  
19 said here. And it may be, based on what comes out of this  
20 witness, although I plan to probably sustain objections,  
21 instruct the jury that this man is not competent to testify as  
22 to the cause and effect of any memory loss, but if I conclude  
23 that there is a limitation on your ability to cross-examine him  
24 on something that comes out, then I'm going to be open to  
25 requiring the production of the medical records. And in a



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1 trial of this length, we could have Mr. Davis recalled, if need  
2 be.

3 But on the present record, there would be no reason  
4 for me to order the production of the medical records, and I  
5 don't anticipate that there will be a set of facts where I will  
6 find a need, because I'm going to tell the jury he's not in a  
7 position to offer a medical explanation for a memory loss. He  
8 can say where he was and what happened to him in general terms:  
9 I had surgery. I was brought to a hospital on a certain date.  
10 And I was feeling -- was not feeling well and I was feeling  
11 better on such and such a date.

12 That's about it.

13 OK. Next issue. What about wiretaps?

14 MR. GOLDMAN: The wiretaps, your Honor, as we briefed  
15 the Court on March 11th, we do not think there should be any  
16 mention of a wiretap.

17 And I think what the defendant's response is  
18 essentially to do what he is now accusing us of doing, which is  
19 to say, oh, this is a legitimate reason to get into the wiretap  
20 and then we can argue that there is no wiretap, here but it is  
21 essentially a bootstrap argument. There is no need --

22 THE COURT: I don't understand you, Mr. Goldman. So,  
23 make yourself clear.

24 MR. GOLDMAN: Let me start from the beginning. OK?

25 As your Honor knows, there was a wiretap for a few

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1 months.

2 THE COURT: Yes.

3 MR. GOLDMAN: The government does not intend to  
4 introduce the existence of the wiretap or any calls related to  
5 that wiretap. There are a few calls on that wiretap that  
6 intercepted Mr. Walters and Mr. Davis. OK?

7 I guess we would have two requests. One is that there  
8 be no mention of the wiretap, and to the extent that any  
9 cross-examination of Mr. Davis occurs related to the wiretap,  
10 that it be simply referred to as a recording of some sort, that  
11 there doesn't need to be the mention of a wiretap, because  
12 essentially it is almost as if you had a mistrial in a prior  
13 proceeding instead of a prior trial. And to the extent --

14 THE COURT: What is the prejudice to the government  
15 from the use of the term "wiretap"?

16 MR. GOLDMAN: Well, because ultimately what we think  
17 they're trying to do, because Mr. Davis -- some of this dates  
18 back to the proffers. Mr. Davis was played these wiretap calls  
19 with him and Mr. Walters in his eleventh proffer, well after he  
20 had admitted to everything. So there is really no good faith  
21 basis to suggest with the defendant that somehow the wiretap  
22 calls were used to coerce or prompt Mr. Davis into cooperating.

23 THE COURT: I just lost something from you, though.  
24 What is the significance of it being a wiretap other than a  
25 recorded call?

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1 MR. GOLDMAN: Because of the next argument that  
2 they're going to make.

3 THE COURT: So far you haven't explained how it would  
4 have any impact. If the argument is that he was coerced to  
5 cooperate by hearing the recordings, whether they are called  
6 mashed potatoes, recordings, or wiretaps doesn't seem to have  
7 much to do with anything.

8 MR. GOLDMAN: Well, they can't introduce the wiretaps,  
9 your Honor. It is hearsay.

10 THE COURT: Why do you say then, therefore, that a  
11 recording is an OK thing to call it --

12 MR. GOLDMAN: Well, because --

13 THE COURT: -- but not a wiretap as if there was some  
14 significance at this point in your story?

15 MR. GOLDMAN: I think I'm getting ahead of myself a  
16 couple of steps.

17 THE COURT: Well, let's stick to where we are right  
18 now. The point you made to me is that they want to argue that  
19 there was something coercive about playing these things to him  
20 and they need to call these things "recordings," not  
21 "wiretaps," and I've lost you on that.

22 MR. GOLDMAN: Understood, your Honor. Let me start  
23 afresh.

24 THE COURT: OK.

25 MR. GOLDMAN: The recordings that they intend -- that

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1 they have indicated in their letter that they would ask  
2 Mr. Davis about, OK, are hearsay of their own client on a  
3 recording. It can be in theory used as prior inconsistent  
4 statements if Mr. Davis denies the conversation or in some way  
5 says something that is different than those recordings.

6 THE COURT: Right.

7 MR. GOLDMAN: OK? So short of that, there is no basis  
8 to introduce these recordings that we can envision. Maybe  
9 Mr. Berke has a different view of it. But there is no basis to  
10 introduce these recordings as impeachment unless they are the  
11 prior inconsistent statements of the defendant. So we can  
12 cross that bridge when we get there.

13 But our point is that there is going to be no mention  
14 in front of the jury of the fact that we had a wiretap, even --  
15 you know, for a variety of reasons. And the defendant cannot  
16 introduce the wiretap as hearsay and cannot make arguments  
17 related to the wiretap that would be eliciting, you know, in  
18 summary or in any other way eliciting hearsay and so --

19 THE COURT: How -- I lost you again, because you don't  
20 seem to be objecting to his cross-examining on recordings that  
21 were played to him. Am I correct?

22 MR. GOLDMAN: Right. Well, we do object to it unless  
23 there is -- you know, unless they lay the foundation through a  
24 prior inconsistent statement.

25 THE COURT: Are you going to elicit the fact that he

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1 was played recordings at the eleventh proffer session?

2 MR. GOLDMAN: It depends on your Honor's ruling. So  
3 we don't think it is appropriate. We don't think there is a  
4 good faith basis for it. But if the Court is going to allow  
5 them to go down that road with him, notwithstanding the fact  
6 that it happened so far down in his cooperation, then we  
7 don't -- we would not elicit it because we don't think that the  
8 wiretap should play any role in this case. We don't think the  
9 defendant has a basis to do it.

10 And what we think they're trying to do is use this  
11 rationale to try to introduce it through Mr. Davis and then  
12 make their law enforcement technique argument to the jury,  
13 which would flag for the jury that there was a wiretap, and  
14 then make an argument that you haven't heard any evidence from  
15 the wiretap, which is prejudicial to us because there was a  
16 wiretap -- they will now know that there was a wiretap -- and  
17 no calls were made. And they can draw the natural inference --  
18 or the defense would believe they're trying to make them draw  
19 the inference that, therefore, these calls must be innocent in  
20 nature or good, demonstrate --

21 THE COURT: But if they are called "recordings," this  
22 danger ceases to exist?

23 MR. GOLDMAN: Yes. We think it actually significantly  
24 mitigates the risk of combining the cross-examination and the  
25 law enforcement technique argument.

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1 THE COURT: Mr. Berke, what are you planning on doing?

2 MR. BERKE: OK, your Honor, and I will tell your Honor

3 I have never heard of such an objection with regard to

4 wiretaps. We have a witness who is going to be testifying. We

5 do anticipate cross-examining him about the recorded calls. We

6 have -- we do anticipate the likelihood of an inconsistent

7 statement about it and a number of different issues, which I

8 would rather not reveal before direct, but if your Honor wanted

9 to hear it right after the direct or in camera. And so that is

10 fair game, and we are allowed to refer to them as wiretaps. I

11 have never heard of a case that said we couldn't. Typically,

12 it is the government introducing it, but there is nothing that

13 prevents us. They are recorded calls. I don't want to have

14 any suggestion that Mr. Walters recorded him. And it is

15 perfectly appropriate to say these are government recordings

16 and you knew about it.

17 In addition, your Honor, during his discussions of

18 cooperation, we understand that he was told there were recorded

19 calls. It wasn't our -- we have a good faith basis to believe

20 that he wasn't told the extent of the recordings. He was

21 played certain recordings. There was a dramatic shift in his

22 testimony, your Honor, about what he said about critical

23 events.

24 We think his -- what he was told about recorded calls

25 may have influenced that, and we have a right to examine that,

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1 your Honor, as part of what we believe is our cross-examination  
2 about his fabrication --

3 THE COURT: Well, it sounds to me -- well, I don't  
4 know what the witness knows, but it may be that this witness  
5 does not know of them as wiretaps but, rather, government  
6 recordings of some type.

7 MR. BERKE: We believe he does know of them as  
8 wiretaps.

9 THE COURT: Well, Mr. Goldman, maybe you can shed some  
10 light on that.

11 MR. GOLDMAN: He was told in the eleventh proffer for  
12 the first time that the government had a wiretap that  
13 intercepted him and Mr. Walters on a couple of occasions, and  
14 he was played those calls at that point. I don't know what  
15 Mr. Berke is referring to when he says that earlier on he was  
16 told that there was a wiretap. It was all done --  
17 Ms. Cucinella and I were both present. It was all done for the  
18 first time at that proffer. So, I'm not sure what he is  
19 referring to.

20 THE COURT: Well, quite frankly, it seems to me that  
21 Mr. Berke can explore what Mr. Davis learned from the  
22 government in a proffer session. I don't understand why that  
23 should be off limits. And it's not.

24 MR. GOLDMAN: OK, your Honor. I mean, we think there  
25 is a 403 argument related to the wiretap and the other

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1 arguments that flow from the wiretap that we think that the  
2 defendant is trying to shoehorn the wiretap through this  
3 witness so they can make another argument that is prejudicial  
4 and could potentially confuse the jury because it has a lot  
5 more force in that regard.

6 THE COURT: Well, it may, and you may have a good  
7 application there. But I'm not inclined at this stage to cut  
8 off cross-examination of what transpired in a proffer session.

9 MR. GOLDMAN: Your Honor, I think the bigger issue for  
10 the government, at least, is the leak issue, and the one that  
11 we would like to turn to next, understanding your Honor's  
12 ruling on the wiretap.

13 There is absolutely no reason to get into the fact --  
14 the source of the articles that were published and including  
15 the confidential leaks. It's inflammatory. It's prejudicial.  
16 It is a nullification play by the defense.

17 If they want to cross-examine the witness about  
18 articles that were published about the investigation, they can  
19 do that in a permissible fashion, but there is no reason to get  
20 into the source of the information. There is no basis to  
21 believe that the witness had any reason to know that the source  
22 of the information was leaks by the government -- us -- as  
23 opposed to the SEC or as opposed to some other source of  
24 information that can get out there and --

25 THE COURT: Mr. Goldman, I'm sure your concern is



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1 unfounded. I'm sure Mr. Berke has no intention of getting into  
2 the sources behind newspaper articles. If he wants to inquire  
3 as to how Mr. Davis' actions were influenced by picking up the  
4 morning's Wall Street Journal and reading certain information  
5 in the Wall Street Journal, that seems to me to be fair game  
6 for cross-examination.

7 MR. GOLDMAN: And we agree.

8 THE COURT: But what the source -- what sources the  
9 reporter had in writing the article does not strike me as  
10 anything to do whatsoever with this case.

11 MR. BERKE: Your Honor, can I address that issue? Two  
12 different unrelated contexts. One, the articles themselves.  
13 In 2014, going into 2015, which the 2015 articles were the  
14 first ones that mention Davis and led to him being asked to  
15 resign from the Dean Foods board, you recall those articles we  
16 believe -- the articles themselves, putting aside what we now  
17 know about the leaks and the like, the articles themselves  
18 reveal very detailed information about what the government is  
19 trying to do and not trying to do. If you recall, a lot of  
20 people who read them said that reads like leaks.

21 We know there are lawyers involved for both Mr. Davis,  
22 Mr. Walters, and we know there is a concern of leaks. I would  
23 submit, your Honor, we have a right to say that for Mr. Davis,  
24 when he is trying to contemplate whether to fight the  
25 government or whether to try to make a deal, the fact that if

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1 he believed after reading these articles that it was the  
2 government -- whether it is the SEC or the U.S. Attorney's  
3 Office, it doesn't matter -- whether the government is leaking  
4 information to the press in order to either pressure people, or  
5 whatever he thought at the time, that he saw in 2014, he saw it  
6 in 2015, and his pressure was building on him because he was  
7 losing all his board positions, his money, and everything else  
8 in part because of these articles, how he thought the  
9 government was doing that, again, his state of mind I would  
10 submit, your Honor, that is absolutely fair game.

11 THE COURT: All right. My ruling is that you can  
12 probe what he did, what his actions were in response to reading  
13 the article, but you may not elicit or suggest in front of the  
14 jury a source for the article. The fact that the reporters had  
15 certain information about his actions may have led him to do  
16 certain things, but probing where do you think the reporter got  
17 the information from is -- to the extent it has any probative  
18 value, it is substantially outweighed by the danger of unfair  
19 prejudice and jury confusion, and I'm not going to allow it.

20 MR. BERKE: That would include, your Honor, if I  
21 wanted to inquire whether he thought the government was putting  
22 pressure on him by leaking information in these articles about  
23 ultimately him in 2015?

24 THE COURT: Well, that would be subsumed in the ruling  
25 I just made.

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1 MR. BERKE: A completely separate issue, your Honor,  
2 that we raised in our letter. So, as your Honor knows, we had  
3 briefing on the issue after the leaking by the FBI agent.

4 THE COURT: Yes.

5 MR. BERKE: Part of what we on February -- if I got  
6 the date right, I think it is February 3rd, the first week of  
7 February -- I'm not sure of the exact date -- we submitted our  
8 reply brief in support of our motion to dismiss. One of the  
9 arguments we made is that Mr. Walters, we argued, was  
10 prejudiced because --

11 THE COURT: I'll tell you what. Why don't we take  
12 this up tomorrow morning?

13 MR. BERKE: Absolutely, your Honor.

14 THE COURT: OK. Thank you very much.

15 MR. BERKE: Thank you.

16 THE COURT: I'll tell you what. What would be great  
17 is why don't you just send me a letter and you can include the  
18 excerpts from the reply brief that you want me to read. That  
19 would be even better.

20 MR. BERKE: Absolutely, Judge.

21 THE COURT: Thank you.

22 MR. BERKE: Thank you.

23 (Adjourned to 9:45 a.m., Tuesday, March 21, 2017)  
24  
25

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